Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-300

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

(Action No. 1)

INLAND CREDIT CORPORATION,

Respondent,

-against-

EDWINA RAGER,

Petitioner.

(Action No. 2)

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

-against-

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

AARON NUSSBAUM
16 Court Street
Brooklyn, N.Y. 11241

Counsel for Petitioners

DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Page

Opinions and Orders in the Courts Below 3

Jurisdiction 2

Questions Presented 3

Constitutional Provisions Involved 4

Statutes Involved 4

Statement of the Case 5

The Proceedings Below 15

Reasons for Granting the Writ 41

Conclusion 49

Appendices:

A—Order and Judgment dated July 6, 1978 ..... 1a

B—Order dated September 1, 1978 and Opinion 4a

C—Order dated April 24, 1979 ..... 8a

D—Order dated May 24, 1979 ..... 11a

E—Order Denying Leave to Appeal to Court of Appeals 13a

F—Agreement Dated November 27, 1974 ..... 15a

G—Letter Dated December 4, 1974 ..... 17a

H—Opinion Below 18a

I—Notice of Petition 23a

J—Amended Answer and Demand for Jury Trial 28a

K—Amended Verified Complaint 41a

L—Order dated September 15, 1978 ..... 55a

M—Medical Report dated June 7, 1978 ..... 56a

N—Medical Report dated May 23, 1977 ..... 57a

O—Severance and Remand of the Summary Proceeding to the Civil Court 58a

P—Affidavit of Bijan Kalantari 60a

TABLE OF CASES

Page

Channel Master Corp. v. Aluminum Limited Sales Inc., 4 NY 2d 403 15

Commonwealth Corp. v. Casualty Co., 393 U.S. 145, 150 49

Crouse v. McVickar, 207 NY 213, 218 16

DeRosa v. Nezolek, 24 A.D.2d 1055 43

Fuentes v. Shevin, 407 U.S. 657 42

Fuhrman v. Fanroth, 254 NY 479 16

Galpin v. Page, 18 Wall 350 41

Gramatan Home Inveestors Corp. v. Lopez, 46 NY 2d 48 (1979) 42

Greenberg v. DeHart, 4 N.Y.2d 511 41

Hanlon v. MacFadden, 302 NY 502 16

Headley v. Noto, 22 N.Y.2d 1; 237 N.Y.2d 871 ..... 41, 44

Hovey v. Elliott, 167 U.S. 409 41

Inland Credit Corporation v. Inspiration Enterprises, Inc., et al., Supreme Court, New York County, Index No. 2166/75 11

Inspiration Enterprises, Inc., et. al., v. Inland Credit Corporation, 57 A.D.2d 800 (First Dept.) 17

Katz v. Posner, 23 AD 2d 774 23

Kay v. Shopwell, Inc., 404 N.Y.S.2d 888 (1978) 23

Lynch v. Household Finance Corp., 405 U.S. 538, 552 42

Mayor of City of New York, 115 NY 599, 614-615 16

Mink v. Kerin, 291 N.Y. 300 41

Paragon Oil v. Rose Fair, Inc., ... 26

Parker v. Stiriz, 7 A.D.2d 647.....43

Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476, 38 S. Ct. 566, 62 L.Ed. 1215.....42

Reed v. Littleton, 275 N.Y. 850.....17

Societe Internationale v. Rogers, 357 U.S. 197.....41

Sortino v. Fisher, 20 A.D.2d 25 (1st Dept.).....43

U.S. v. Atkins, 260 US 200, 224.....16

United States v. Grinnel Corp., 384 US 563, 583.....4, 45, 48

United States v. Throckmorton, 98 US 61, 68.....16

Vittorino v. City of New York, (1st Dept.) 22 A.D.2d 883.....43

Ward v. Town of Southfield, 102 NY 287.....16

Wolf v. Associates Discount Corp., 12 A.D.2d 241.....43

Young v. Regan, 337 U.S. 236.....42

Zeiger v. Kew Towers, Inc., 8 A.D.2d 827, 190 N.Y.S.2d 93 (2nd Dept.).....44

In the

Supreme Court of the United States

October Term, 1979

No. .....

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

(Action No. 1)

INLAND CREDIT CORPORATION,

Respondent,

-against-

EDWINA RAGER,

Petitioner.

(Action No. 2)

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

-against-

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review an order and judgment of the Supreme Court of the State of New York, Appellate Division, First Department, dated April 24, 1979, which affirmed, without opinion, an order and judgment of the Supreme Court, New York County (Hon. Martin Evans) dated July 6, 1978, entered July 18, 1978, dismissing Petitioners' action "with prejudice and on the merits," designated *Action No. 1* of *Appeal No. 1* in the within-captioned Petition; severed Action No. 2 and remanded it to the Civil Court of the City of New York, County of New York, for jury trial; affirmed, without opinion, an order of the same Supreme Court of the State of New York County, County of New York (Hon. Martin Evans), dated September 1, 1978, entered September 7, 1978 (designated *Appeal No. 2*), denying Petitioners' cross-motion to vacate a judgment of foreclosure entered by default against the Petitioners on October 28, 1978, upon the grounds of (1) fraud perpetrated by Respondents against the Petitioners; (2) fraud perpetrated against the court; and (3) excusable default.

On motion of Petitioners, the two captioned Appeals Nos. 1 and 2 herein were consolidated by order of the Appellate Division, First Department, for the purpose of argument.

On July 10, 1979, the New York Court of Appeals denied Petitioners' motion, pursuant to *New York Civil Practice Law and Rule 5602(a),* for leave to appeal from the order of the Supreme Court, Appellate Division, First Department, dated April 24, 1979 aforestated, as to *Action No. 1.* In a memorandum decision, the Court of Appeals stated:

"Motion, insofar as it seeks leave to appeal from so much of the order of the Appellate Division as affirmed an order in 'Action No. 2', dismissed upon the ground that that portion of the order

does not finally determine the action within the meaning of the Constitution; motion for leave to appeal otherwise denied.

Motion for a stay dismissed as academic." (Appendix 13a-14a).

OPINIONS AND ORDERS IN THE COURTS BELOW

The order and judgment of the Supreme Court, New York County (Hon. Martin Evans) dated July 6, 1978, is printed in *Appendix A* hereto, *infra*, at pp. 1a-3a.

The order and unreported opinion of the same Court, dated September 1, 1978, is printed at *Appendix B,* at pp. 4a-7a.

No opinion was rendered either by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department; or by the New York Court of Appeals.

The order of the Appellate Division, First Judicial Department, Supreme Court of the State of New York, dated April 24, 1979, is printed in *Appendix C,* pp. 8a-10a. The order of the same Court dated May 24, 1979 denying reargument, and denying leave to appeal to the New York Court of Appeals, is printed in Appendix D, pp. 11a-12a.

The order of the Court of Appeals dated July 10, 1979 denying leave to appeal is printed as Appendix E, pp. 13a-14a.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. Section 1254(1).*

QUESTIONS PRESENTED

1. Were Petitioners deprived of due process of law where their causes of action were dismissed "with prejudice and on the merits" for alleged neglect to proceed to trial, although the history and record of proceedings in the state court negated any finding of neglect on the part of Petitioners in the prosecution of the action?

2. Where New York's legislative policy generally provides that dismissal of an action for neglect or delay in proceeding to trial shall be "not on the merits," unless the order specifies otherwise, were Petitioners deprived of due process of law in the

dismissal of their causes of action "on the merits," without a trial or hearing or opportunity to be heard, in the absence of any indicia of neglect or delay whatever, let alone unreasonable neglect or delay, in the prosecution of the causes of action?

3. Were Petitioners deprived of due process of law where the disqualifying bias and prejudice of the trial judge, stemming from an extrajudicial source, was plainly reflected in a continuing pattern of totally adverse rulings against Petitioners "manifesting a closed mind" (*United States v. Grinnel Corp.*, 384 US 563, 583)?

The federal questions presented herein were duly raised in the Supreme Court of the State of New York, Appellate Division, First Department, and in the New York Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

The *Constitution of the United States, 14th Amendment:*

" . . . nor shall any State deprive any person of life, liberty, or property without due process of law, ..."

The *Constitution of the State of New York, Article 1, Section 6:*

"No person shall be deprived of life, liberty or property without due process of law."

STATUTES INVOLVED

New York Civil Practice Law and Rules:

Rule 3216. Want of prosecution

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

Rule 5015. Relief from judgment or order

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or

2. . . .

3. fraud, misrepresentation or other misconduct of an adverse party; or

4. . . .

5. . . .

STATEMENT OF THE CASE

The Fraud Perpetrated Against Petitioners

In May 1972, Petitioners Edward Rager and Edwina Rager, his wife, were the owners of various properties as follows: *16 East 65th Street, New York, N.Y., Flowervale, Inc.* and *Rose Fair, Inc.*, located in Suffolk County, State of New York; and *Floral Gardens, Inc.*, located in Bergen County, State of New Jersey. All conducted active businesses as flower nurseries, and the sale at retail and wholesale of flowers and horticultural products. The total value of these properties exceeded five million dollars.

Rose Fair, Inc. consisted of 23 acres, four residences and 140,000 sq. ft. of greenhouses, was reasonably valued at $2,000,000 and had a bank first mortgage thereon reduced from $181,000 to $96,000.

In their very first contact with Respondent Inland Credit Corporation ("Inland"), petitioners sought second mortgage refinancing for their properties in an amount of approximately $900,000. Respondents became seriously interested, instead, in

purchasing Petitioners' properties, but at a price ridiculously below fair market value. Respondents offered to buy Petitioners' Suffolk County properties of Flowervale and Rose Fair for $1,800,000, which was far less than half their reasonable worth and value.

On or about May 1, 1972, Respondent Stern offered $600,000 for Flowervale, Inc., alone, which Petitioners likewise immediately rejected because the land alone was worth conservatively at least $500,000. The offer to buy was withdrawn by Respondents by letter dated May 3, 1972 (Motion for Summary Judgment, Aff. Edwina Rager, pp. 3-5).

Accordingly, on May 5, 1972, Petitioners obtained a second mortgage consolidated loan from Inland in the sum of $160,000, payable May 1, 1975, on real property situated at 16 East 65th Street, New York. The fair market value of the property exceeded $450,000. The Petitioners' net equity therein above all mortgages exceeded $175,000.*

The real property in issue is a five-story elevator townhouse located between Fifth and Madison Avenues, New York City, containing five rental units, including a law office and suite maintained by the Petitioner Edward Rager, an attorney at law, and occupied by the Ragers as their marital residence since 1957.

On the same day, May 5, 1972, simultaneously therewith, Petitioners also obtained from Inland a second mortgage consolidated loan for $100,000, likewise payable May 5, 1975, on Petitioners' real property known as Flowervale, Inc., located in Suffolk County, State of New York. Flowervale conducted an active flower-growing business, at retail and wholesale, yielding a net income of approximately $140,000 a year.

The reasonable worth and value of Flowervale was approximately $1,000,000, consisting of 7-1/2 acres of land, together with various buildings, residences and greenhouses thereon. Petitioners' equity therein, above all mortgages, was approximately $800,000.

And, on the same day, May 5, 1972, Respondents also issued a second mortgage loan of $160,000, payable in 3 years, on Petitioners' property and flower-nursery business of Rose Fair, Inc. located at Blue Point, Long Island, in Suffolk County.

* Petitioners realized only $1,823.00 on this loan, after payment of the consolidated loans by Respondent.

Because of the oppressive interest rates of 22% on the second mortgage loans issued by Respondents aforestated, Petitioners succeeded in arranging the re-financing of the Rose Fair second mortgage loan held by Respondents with a bank loan at a greatly reduced interest rate in October 1973.

On October 1, 1974, Petitioners involuntarily defaulted on the loans involved herein.

Following several discussions between the parties, Inland entered into a written agreement on November 27, 1974 with Petitioners extending the Flowervale mortgage to August 31, 1975 (Appendix F, pp. 15a-16a).

Companionate thereto, approximately one week later, on December 6, 1974, Inland entered into another written agreement, on the letterhead of Respondent Inland Credit Corporation, covering both the Flowervale and the New York properties (Appendix G, p. 17a) reading as follows:

INLAND CREDIT CORPORATION
685 Fifth Avenue
New York, New York 10022 (212) 687-3400

December 4, 1974

Mrs. Edwina Rager, President
Inspiration Enterprises, Inc.
29 Maple Street
Blue Point, Long Island

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Credit Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of pro-

per sign on building and diseminating information to brokers, and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interst and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage.

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

Very truly yours,

INLAND CREDIT CORPORATION

Oscar Dane
Chairman of the Board

O D : m e z

Several penned inserttions made therein by Petitioner Edward Rager were initialled and agreed to by Inland, as follows:

"With leave to Edward Rager to use his efforts to effect an advantageous sale."

"You are granted leave to occupy the premises first and second floor and basement as heretofore, sixty days from the sale to remove all personal property from the buuilding."

"In Flowervale: No default unless Suburbia grants no extension and intends to foreclose."

(Appendix G, p. 17a).

Petitioners' express purpose stated to Respondents, as plainly indicated in the agreement, was to sell the property at 16 East 65th Street, New York, apply the proceeds of the sale to satisfy the Flowervale mortgage, and Petitioners would thus be enabled to carry on the Flowervale nursery business and livelihood for the retail and wholesale sale of flowers. Respondents' two mortgage loans would thus be fully paid "in lieu of foreclosure," under this agreement.

Simultaneously with the execution of the written agreement on December 6, 1974, and in complete reliance on the Respondents' representations contained therein, Petitioners then and there deeded over their real property 16 East 65th Street, New York, New York, to Ardisco Financial Corporation, a wholly-owned and controlled subsidiary of Inland.

In truth and in fact, Respondents' representations contained in the letter-agreement signed December 6, 1974 were knowingly false and fraudulent, and were made by them to deceive the Petitioners and to defraud them of their properties aforesaid.

To the actual knowledge of Respondents, the Petitioner Edward Rager was then and there seriously ill emotionally, mentally and physically, and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or to act as attorney for the Petitioners Inspiration Enterprise, Inc. and Edwina Rager, his wife, and was mentally incapacitated from protecting their legal and equitable rights therein.

Further, the Respondents wilfully and fraudulently aggravated and compounded Edward Rager's mental illness and incapacitation, in order to prevent and thwart him, both individually and as attorney for petitioners Inspiration Enterprises, Inc. and Edwina Rager, from taking any legal action or counter-action against Respondents, or from interposing a proper defense or defenses on the merits to any foreclosure action which Respondents then and there fraudulently contemplated instituting against the Petitioners therein.

In effectuation of their corrupt intent to defraud, the Respondents on said December 6, 1974, while then and there present, immediately stole the signed original letter-agreement from the possession and custody of Petitioners, and did thereafter wilfully refuse to return the said written agreement, or to provide a photocopy thereof to Petitioners, despite repeated demands therefor.

Immediately after acquiring Petitioners' deed to 16 East 65th Street on said December 6, 1974, as aforestated, Respondents fraudulently advertised the property "For Lease" instead of for sale; wilfully and wrongfully thwarted Petitioners from all efforts to sell the property, and wrongfully and wantonly sabotaged, frustrated and discouraged all potential buyers, as well as all potential efforts by the Petitioners to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, New York, for the agreed purposes aforesaid.

In further pursuance of the fraudulent representations, Respondents demanded that Petitioners forthwith surrender possession and occupancy of the premises; Respondents wantonly failed and neglected to maintain or service the premises, or to keep it in good repair and condition; further, Respondents wantonly harassed, maligned and villified Petitioners and repeatedly coerced, intimidated and terrorized them into surrendering and abandoning the occupancy and possession of the premises forthwith.

On January 8, 1975, Respondent Stern, president of Inland, suddenly entered the premises without authorization and demanded that Petitioner Edward Rager "get out of here. Go to the gutter where you belong," and then yelled at him: " *.*.*. everybody and all the judges know that you are insane." (Motion for Summary Judgment, Aff. Edwina Rager, p. 21).

Shortly thereafter, on or about January 27, 1975, Respondent Inland fraudulently instituted a foreclosure action against Petitioners in the Supreme Court of the State of New York, County of New York, and did wrongfully cause Petitioners to default therein and did, on October 28, 1975, fraudulently cause and procure a purported judgment of foreclosure to be entered by default; and did on December 11, 1975, fraudulently cause a Referee's Deed in Foreclosure to be conveyed and delivered to Respondent Inland.

Further, and simultaneously therewith, Respondents, on or about January 29, 1975, fraudulently instituted a foreclosure proceeding against Petitioners' property of Flowervale, Inc. in Suffolk County, and did likewise procure a judgment of foreclosure by default on October 30, 1975, and to be entered

therein on November 28, 1975, and did likewise cause the issuance and delivery of a Referee's Deed in foreclosure on or about January 7, 1975, to Plantation House & Garden Products, Inc., a wholly owned subsidiary Delaware corporation of Respondent Inland which it had organized in 1972, shortly after granting the mortgage loan on Flowervale.

The sudden collapse of Petitioners' properties of 16 East 65th St., New York, N.Y. and Flowervale, Inc. inevitably triggered the abrupt termination of all ongoing negotiations then actively pending with various banks for the re-financing of Flowervale, Inc. and Floral Gardens, New Jersey. Further, the swindling of Petitioners' deed to 16 East 65th Street, New York, N.Y. ended all further possibility of re-financing that property as well. (Aff. Edwina Rager, pp. 13-14, Opposition to Motion for Summary Judgment).

The Mental Incapacitation of Petitioner Edward Rager, Individually and as Attorney

On June 23, 1975, Petitioner Edward Rager suddenly abandoned the defense of the mortgage foreclosure proceedings and fled to Canada. On that day, he sent a rambling 48 page, single-spaced letter initially dated June 18, and concluded on June 23, 1975, in a "Final Appeal to the President of the United States of America" to "Stop the Political Persecution and Destruction of Edwina Rager Through the Ruse of American Court, as Tool of Vengeance and Cruel Sport."

The disabling mental illness of Edward Rager was fully documented in the court records of the mortgage foreclosure proceedings herein, both in New York County, affecting 16 East 65th Street, as well as in Suffolk County, involving Flowervale, Inc.

Instead of appearing as attorney for Petitioners in the mortgage foreclosure proceeding, or making any motion addressed thereto (*Inland Credit Corporation v. Inspiration Enterprises, Inc., et al.*, Supreme Court, New York County, Index No. 2166/75), Edward Rager submitted to the Court an incomprehensible motion to consolidate the foreclosure proceeding with five other unrelated actions.

In a supporting 20-page rambling affirmation, dated February 12, 1975, he stated:

> "Only an official appearance and action by a Bar Association can help, at least as to the present practices by Mulloo-ly, Greenstein, Dane and their brother lawyer for the mobster Gianokos.
>
> John W. Davis, Henry L. Stimson, Samuel Seabury, Chief Justices of the Appellate Division Finch, Martin and Lazansky lauded me for 'unusual dedication to true brotherhood among members of the Bar'. Now, that I am about to be thrown, as threatened, "INTO THE GUTTER", help by the brethren at the Bar is urgently needed and I pray that this Court in the name of God's justice and compassion finds a way in this Great Land of Justice and Freedom".

During the course of the mortgage foreclosure proceedings, and the "motions" filed therein, as aforestated, he filed another incoherent motion on February 14, 1975, returnable on February 27, 1975, for leave to serve a proposed amended supplemental complaint, consisting of 41 pages.

On the return day of that motion, Edward Rager dragged into the courtroom of Mr. Justice Helman a huge sign advertising the property "FOR LEASE OR SALE", which the Respondents had affixed to the building the very day it had procured the deed from Petitioner on December 6, 1974, under the fraudulent letter-agreement whereby the Respondents specifically agreed to sell, not lease, the property.

On April 18, 1975, the Supreme Court, New York County (Helman, J.) dismissed the Petitioners' complaint and denied his motion, terming it an "*incomprehensible document*".

On June 12, 1975, in a supplemental motion thereto, filed in the Supreme Court, New York County, Mr. Justice Hughes referred to "*the almost incoherent affidavit of Edward Rager, counsel for movants.*"

The incapacitating mental illness of Petitioner Edward Rager was further amply documented in the interrelated mortgage foreclosure proceeding by which the Respondents

fraudulently obtained a judgment of foreclosure by default in the Supreme Court, Suffolk County, with respect to Flowervale, Inc.*

In that proceeding, in a memorandum-decision rendered by Mr. Justice Pittoni thereon on September 3, 1975, denying Rager's motion to vacate Rager's default in pleading therein, the Court referred to "*the rambling, almost incoherent moving affidavit of the attorney for the defendant.*"

In desperation, Petitioner Edwina Rager sought the aid of at least 20 named attorneys and reputable firms of attorneys in New York, Nassau and Suffolk Counties to obtain substitute counsel (Aff. Edwina Rager, par. 44, Motion for Summary Judgment).

Court records in the New York foreclosure action document the fact that on August 12, 1975, Petitioner Edwina Rager addressed a letter to Mr. Justice Chimera, before whom the mortgage foreclosure proceeding was pending, requesting additional time to find a new attorney, and seeking the help of the New York City Bar Association, the New York County Lawyers Association, the Nassau Bar Association, and the Suffolk County Bar Association (Aff. Edwina Rager, par. 44, Motion for Summary Judgment).

On August 13, 1975, she wrote to Mr. Justice Hughes, begging for additional time, concluding *inter alia*, as follows:

> "With the prayerful hope that someone will come to my aid as counsel, I am sending copies of this letter to the American Bar Association, New York County Lawyers' Association, New York City Bar Association.
>
> I beseech this highly esteemed Court and Your Honor,

---

*There, too, without any opportunity to defend, Petitioners had suffered a mortgage foreclosure by default, due to Edward Rager's serious mental illness.

Since the fraudulent foreclosure proceedings affected Petitioners' New York property as well as Flowervale, Inc., Petitioners simultaneously instituted an action to vacate the judgment procured by fraud as to Flowervale, Inc. in Suffolk County.

most respectfully, to give me time to find counsel so that the above action is not dismissed."

On August 18, 1975, Petitioner Edwina Rager again addressed a letter jointly to Mr. Justices Chimera and Hughes, frantically begging the Court for additional time to get counsel.

The Fraudulent Referee's Sale of the Foreclosed Premises

On September 9, 1975, the Supreme Court, New York County (Chimera, J.) awarded summary judgment to Inland, by default. On October 28, 1975, the judgment of mortgage foreclosure, by default, was granted by the Supreme Court, New York County (Postel, J.).

Subsequently, the Respondents fraudulently advertised the public sale of the foreclosed property, to take place in the Rotunda of the Supreme Court, New York County, on December 5, 1975. However, though a ready, willing and able potential buyer of the property appeared at the time and place aforesaid, there was no one actually present at the Referee's sale—neither the Respondent Inland, nor its counsel, nor the Referee in Foreclosure (*Action No. 2,* First Affirmative Defense; *Action No. 1,* paras. 29-37).

The Referee's Deed in Foreclosure to the Respondent Inland was executed on December 11, 1975, but the Referee's Deed contained an acknowledgment before a Notary Public dated December 19, 1975 (para. 34).

Respondents' Fraud Upon the Courts

The Repondent Inland, not only by fraud perpetrated against the Petitioners but also by fraud perpetrated against the Court, fraudulently procured a judgment of foreclosure by wilfully suppressing and concealing from the Court the vital fact that the terms and conditions of its mortgage had been entirely superseded and modified by the signed letter-agreement on December 6, 1974, which expressly provided that there was to be no foreclosure of either the New York or the Suffolk Flowervale

properties under the terms thereof.

Further, Respondent Inland fraudulently concealed from the Court the fact that the deed to the mortgaged property at 16 East 65th Street, New York, had been given to Inland's wholly-owned subsidiary, Ardisco Financial Corporation, and that by such conveyance to Inland it had merged with and extinguished the mortgage indebtedness of the Petitioners, as a matter of law.

THE PROCEEDINGS BELOW

The Arbitrary Dismissal of Petitioners' Causes of Action "With Prejudice and On the Merits," Without Trial or Opportunity to Be Heard.

On March 6, 1976, Respondent Inland commenced a summary proceeding against Petitioner Edwina Rager by a Petition filed in the Civil Court, County of New York, for a final judgment of eviction from the premises 16 East 65th Street, under the purported judgment of foreclosure. (Appendix I, pp. 23a-27a).

Petitioner Edwina Rager interposed an Answer, Affirmative Defenses and Counterclaims thereto, and duly demanded a trial by jury, constituting Action No. 2 in the within-captioned Appeal No. 1 (Appendix J, p. 28a).

The *First Affirmative Defense* therein alleged that the Referee's Sale of the purportedly foreclosed mortgaged premises was null and void, and should be cancelled and vacated of record on the ground that neither Inland nor anyone acting in its behalf, nor the Referee in Foreclosure, appeared at the time and place fixed for the Public Sale of the foreclosed premises, in that Inland failed to comply with the applicable statutes governing the Public Sale and advertising of mortgaged premises under foreclosure as required by *Section 231, subd. 3,* and *Section 1403, New York Real Property Actions and Proceedings Law,* and was thus not legally entitled to maintain the summary proceeding (par. 3-12).

The *Second Affirmative Defense,* in specific detail as aforestated, alleged that the purported judgment of disclosure

had been fraudulently procured by Inland against the Petitioners and was wholly null and void at its very inception, and should be vacated and set aside (par. 13-33).

The *Third Affirmative Defense and Counterclaim* alleged that the Petitioners sustained damages as a consequence of the wilful fraud perpetrated by Inland, resulting in compensatory and punitive damages to Petitioners in the sum of Ten Million Dollars (paras. 34-35).

Simultaneously therewith, on March 15, 1976, Petitioners instituted the within-captioned *Action No. 1* against Respondents in the Supreme Court, New York County, Index No. 4252/1976, demanding vacatur of the default judgment of foreclosure, on the ground of fraud in the procurement of the judgment.*

The allegations of fraud contained in *Action No. 1* were virtually identical to the allegations set forth in the counterclaims asserted by the Petitioners in the summary proceeding, *Action No. 2.*

In a second cause of action thereto, Petitioners demanded compensatory and punitive damages in the sum of Ten Million Dollars, on the ground of fraud.** (Appendix K, pp. 41a-54a).

On April 30, 1976, after vigorous opposition by Inland to Petitioners' motion for an injunction and the dispensation of an undertaking, Mr. Justice Tyler, at Special Term, Supreme Court, New York County, granted an order of consolidation on consent, and further granted Petitioners' application for a restraining order pendente lite, without undertaking, as follows:*

> "Motion by the plaintiffs for an order consolidating this action with another action pending in the Civil Court, New

* A judgment may be attacked collaterally if there was actually fraud in procuring the judgment. *United States v. Throckmorton,* 98 US 61, 68; *U.S. v. Atkins,* 260 US 200, 224; *Mayor of City of New York,* 115 N.Y. 599, 614-615; *Ward v. Town of Southfield,* 102 NY 287; *Crouse v. McVickar,* 207 NY 213, 218; *Fuhrman v. Fanroth,* 254 NY 479.

** Petitioners' second cause of action in Action No. 1, for compensatory and punitive damages in the sum of Ten Million Dollars, was predicated on the essential component elements of fraudulent representations, intent to defraud, reliance, scienter and injury, in accord with the judicial precedents appertaining thereto. (*Hanlon v. MacFadden,* 302 NY 502; *Channel Master Corp. v. Aluminum Limited Sales, Inc.,* 4 NY 2d 403).

> York County, is granted on consent. The stay (Stecher, J.) (entered March 15, 1976) prohibiting any sale or transfer of the premises at 16 East 65th Street, New York, N.Y., by the defendants is continued. Settle order providing for an immediate trial."

On August 25, 1976, Respondent submitted a proposed order removing *Action No. 2* from the Civil Court of the City of New York, and consolidating it with *Action No. 1,* and further providing that the case be placed at the head of the Equity Day Calendar for trial in September 1976.

The Court struck and deleted from the Respondents' proposed order, as submitted, a provision that Petitioners be required to file an undertaking in the sum of $160,000.

There then ensued a series of protracted motions and appellate proceedings between the parties, involving (a) Petitioners' right to consolidate the Flowervale action which they had instituted against Respondents in the Supreme Court, Suffolk County, which was "virtually identical" to *Action No. 1,* based on the identical fraud specifically alleged therein. (See *Inspiration Enterprises, Inc., et. al., v. Inland Credit Corporation,* leave to appeal granted, 55 A.D.2d 527, appeal dismissed, 40 N.Y.2d 1014); (b) Petitioners' statutory and constitutional right to a jury trial (see *Inspiration Enterprises, Inc., et al., v. Inland Credit Corporation,* 57 A.D.2d 800 (First Dept.); and (c) Petitioners' rights of discovery, all of which were systematically opposed by Respondents in a sustained effort to deprive Petitioners of the elemental rights of trial, as more specifically set forth herein.

By letter dated September 7, 1976, from Petitioners' counsel to Mr. Justice Tyler, a conference was requested concerning settlement of the proposed order, particularly as to (a) Petitioners' right to a jury trial; (b) discovery and inspection pursuant to *CPLR Art. 31*; (c) the proposed undertaking inserted by Respondents in the proposed order; and (d) the deferral of the trial until the appeal involving the consolidation of the

*A preliminary injunction is granted only where the papers in support thereof establish a clear legal right to relief (*Reed v. Littleton,* 275 N.Y. 850). Court of Appeals, pursuant to *CPLR 5601(a).*

Suffolk County action shall be determined by the Appellate Division, First Department.

Petitioners' counsel was thereupon assured by Mr. Justice Tyler's Law Secretary that such a conference would be granted to counsel, before signing the proposed order as submitted by Respondent. However, inadvertently, the order was prematurely signed by Judge Tyler on September 16, 1976, directing trial to be held on September 30, 1976. Mr. Justice Tyler struck out the proposed undertaking completely.

On September 22, 1976, the Respondents served and filed a Note of Issue, with a "Statement of Readiness," falsely certifying and representing to the Court, as follows:

> "1. All necessary or proper preliminary proceedings allowed by statute and rule applicable to the action (Civil Practice Law and Rules, Article 31, Section 3041 and Rules 3042, 3043 and 3044) and by rules of the Appellate Division applicable to notes of issue. Superceded by Court Order.***
>
> "3. This action is ready for trial Pursuant to Court Order, served on Clerk herewith."

On Petitioners' request, counsel for both sides then conferred with Mr. Justice Tyler on September 29, 1976, regarding the order inadvertently signed, as aforestated. At that conference, Mr. Justice Tyler assured Petitioners' counsel, in the presence of Respondent's counsel, that the order as signed should not preclude Petitioners from advancing their right to jury trial, and to their right to procedures for discovery, by due application to the trial judge to whom the case will be assigned.

The consolidated action was assigned to the IC Part I for trial, before Hon. Irving Smith, Acting Supreme Court Justice. On October 21, 1976, after conference in chambers, Mr. Justice Smith arbitrarily denied Petitioners' application for examinations before trial, and set the trial date for November 10, 1976. Further, Judge Smith made an oral order in chambers, denying Petitioners' demand for trial by jury, and further, arbitrarily denied Petitioners' application to make and enter a written formal order therein, as required by the Civil Practice Laws and Rules, for the purpose of appellate review thereof.

In the interim, on May 24, 1976, Mr. Justice Baer, at Special Term, Supreme Court, New York County, denied Petitioners' motion to remove and consolidate the Suffolk County action with *Actions Nos. 1 and 2* at bar. The Court denied reargument. (NYLJ June 22, 1976)

On November 9, 1976, the order of Mr. Justice Baer was affirmed by the Appellate Division, First Department (Lupiano, J.), dissenting (54 App. Div. 2d 839).

On November 12, 1976, Mr. Justice Nunez, Associate Justice of the Appellate Division, First Department, duly stayed all proceedings pending Petitioners' application for leave to appeal to the New York Court of Appeals.

On November 30, 1976, the Appellate Division, First Department, granted leave to appeal to the Court of Appeals on a certified question of law, but vacated the stay without prejudice to an application for a further stay in the Court of Appeals.

On December , 1976, Judge Fuchsberg duly granted a stay pending the appeal in the Court of Appeals. However, on December 16, 1976, notwithstanding the grant of permission to appeal on a certified question, as aforesaid, the Court of Appeals dismissed the appeal "upon the ground that the question certified does not raise a question of law decisive of the correctness of the determination of the Appellate Division, 54 AD 2d 839." (40 N.Y. 2d 1014)

On December 28, 1976, Petitioners thereupon filed a Notice of Appeal to the Court of Appeals, from the order of the Appellate Division, First Department, rendered November 8, 1976 (Lupiano, Ch.J., dissenting), appealable as of right to the Court of Appeals, pursuant to *CPLR 5601(a)*.

On December 30, 1976, counsel for the parties appeared in the New York Chambers of Chief Judge Breitel of the New York Court of Appeals, in connection with Petitioners' application for a stay of all proceedings pending the determination of the appeal.

At that hearing, Counsel for Respondents informed Chief Judge Breitel that Judge Smith had been re-assigned back to the Civil Court, and that in view thereof, it was not anticipated that the trial of the within actions would be commenced until sometime towards the end of January 1977.

Further, the Respondent's attorneys stipulated and agreed that they would "unconditionally" consent to Petitioners' demand for consolidation of the Suffolk County action with *Actions 1 and 2,* and would "unconditionally" consent to an order to effect such consolidation.

Accordingly, upon the assurance by Respondent's counsel that this cae will not be tried in any event before the end of January, and upon the suggestion by Chief Judge Breitel that — in view of the new developments aforestated, there would be no need for an interim stay of the trial, and that Plaintiffs could apply for a stay to the full Court convening on January 7, 1977 — Petitioners' counsel thereupon withdrew the application for the interim stay. (Transcript, Jan. 17, 1977, pp. 6-7)

The consolidated actions herein were subsequently reassigned to Hon. Martin Evans, Acting JSC, Presiding.

On January 5, 1977, Mr. Justice Evans called counsel to an informal conference to familiarize the Court with the status of the case. Petitioners' counsel thereupon advised the Court concerning the issues awaiting determination, namely, the right to a jury trial, as to *Actions 1 and 2*; the right to deposition by interrogatories theretofore served upon the Respondents on September 17, 1976, and the pending consolidation of the Suffolk County action agreed to "unconditionally" with the Respondent on December 30, 1976.

In response thereto, the Court accepted the consolidation so consented to by the parties, and directed that an order therein be submitted.

As to the jury issue, following dismissal of Petitioners' mandamus proceeding, Petitioner then served and filed a motion returnable January 17, 1977 before Mr. Justice Evans to reinstate Petitioners' right to a jury trial, both as a matter of constitutional right, pursuant to *Art. 1, Sec. 2* and *Art. 6, Sect. 18 of the New York State Constitution,* and of statutory right pursuant to *CPLR 4101* and *Sec. 745 Real Property Act & Proceedings Law.*

The Motion for Disqualification of Trial Judge

On the day following the initial conference held by the Court with counsel on January 5, 1977, and at the very inception of Mr. Justice Evans' assignment to this case — without the

foreknowledge or sanction of Petitioners' counsel — Edward Rager sent a rambling, disjointed telegram from Canada, addressed to Mr. Justice Evans, requesting his disqualification, and reading as follows:

> "Sent you copy telegram appeal President Carter Vance Judges Lupiano Managan, asking help Edwina, replacing you by Justice Supreme Court, assuring jury trial, unobstructed by you exams frame amended supplemental complaint reciting all wrongs on me. Omitted from present, request your disqualification account better* enmity by your father in battle participated by Judge Mangan then my employee, also your appearance during Paderewski hearings before Bieber, unconscionable evil enemy, framer contempt against me, partner Bullock, other wrongs. New counsel needs at least twenty days to study voluminous files in Court before examining Greenstein. Principle director conspiracy and thereafter Dane, Stern others. Ask Carter assure for me immunity from frameups, safety, protection from conspiracy in Court to denegrate me as insane, your refusal to make my telegram part of record. I very sick, hardly able even to eat, sleep, cannot travel now anywhere. The complex Carter telegram has more gruesome details."

Mr. Justice Evans informed counsel of the receipt of the telegram. However, in the state of the record, Petitioners' counsel did not deem it necessary or proper to make any motion to disqualify Judge Evans for bias or prejudice against petitioners.

Subsequenty, however, on January 17, 1977, the Petitioners were duly constrained to move to disqualify Mr. Justice Evans because of the Court's manifest bias shown in consolidation proceedings.

Despite the stipulation by Respondents' counsel, made to Chief Judge Breitel, to consolidate the identical Suffolk County action "unconditionally," Mr. Justice Evans *sua sponte* and of his own volition, prepared a proposed order of consolidation, in which the Petitioners were designed as "Defendants" in the newly consolidated actions, thus forfeiting the right to open and close before a jury!

* (*sic*) i.e. bitter.

This clearly arbitrary and capricious action, seriously detrimental to Petitioners' rights of a fair trial and due process, was utterly inexplicable in face of the fact that in the previous consolidation of *Actions Nos. 1 and 2,* herein, the Petitioners were duly designated as the Plaintiffs (Order Tyler, J., Sept. 16, 1976), and that the proposed consolidation of the Suffolk County action was on Petitioners' own motion, "unconditionally" assented to by Respondents' counsel.

> "THE COURT: Can you enlighten me as to what hearing I am supposed to have attended before Bieber? I have no recollection.
>
> MR. NUSSBAUM: I am sure Your Honor doesn't have any, but I may say to Your Honor that in the absence of any recollection a telegram of this kind would be apt, Your Honor, to prejudice this plaintiff before you, having presented this situation now at this late date before Your Honor.
>
> I respectfully submit that on the basis of this telegram that Your Honor should disqualify Your Honor so that the defendants can be assured of receiving an absolute fair and impartial trial. I say this with the utmost humility to the case in that Your Honor will grant the defendant's request. But I cannot see how Your Honor can erase from your mind the facts produced here by Dr. Rager in this telegram.
>
> Secondly, I am asking the Court to disqualify yourself for the reason that, on the basis of the proposed order that has been presented to me, on the basis of the consolidation of Action No. 3. Again I say with the utmost deference and respect to the Court that on the basis of that proposed order it is clear to me that whether intentionally or not the form and the substance of that order has been too framed in every aspect; that it is clearly slanted against the plaintiff without any basis, Your Honor.
>
> It is just inconceivable to me that any such order could have been prepared except possibly by the defendant. If Your Honor will tell me that it's the defendant that prepared this order, then I will withdraw this aspect of my motion to disqualify. But if the Court did it, then I must ask Your Honor to disqualify itself on the basis of the submission to me for approval of that counter-order, because I don't see how this defendant can receive a fair and impartial trial before Your Honor and a jury in this matter." (Trans. Jan. 17, 1977, pp. 18-20).

On September 17, 1976, Petitioners had duly served written Interrogatories upon the Respondents. They made no motion or stated any ground for objection thereto whatever, as required by *CPLR 3133(a)(1),* but simply ignored the Interrogatories duly served upon them.

Accordingly, on January 4, 1977, Petitioners were compelled to serve a Notice of Motion upon Respondents, returnable January 17, 1977, to force disclosure pursuant to *CPLR 3126.* The supporting affidavit thereto set forth, *inter alia,* as follows:

> "In view of the foregoing facts and circumstances, there will now be ample time for the defendants to comply with the demand for written Interrogatories herein, as well as the other disclosure devices provided by Article 31 CPLR, and the defendants cannot be possibly prejudiced thereby. All disclosure proceedings can be completed by the end of January 1977 without in any way delaying the orderly scheduling of the trial by the newly assigned Justice.
>
> The Interrogatories served upon the defendants herein are material and relevant to the essential issues of fraud and deceit framed by the pleadings herein.
>
> We respectfully call the Court's attention to the fact that the principal reason for the employment of Interrogatories as a disclosure device in the case at bar is to obviate the prohibitve costs in a recorded oral deposition at standard rates averaging $3. to $4. per page, for each defendant."

At the same conference held on January 5, 1977, concerning Petitioners' motion to compel disclosure (originally made returnable January 17, 1977), as aforestated, the Court arbitrarily limited Petitioners' right of discovery either to Interrogatories or oral depositions, but not both—a ruling contrary to *CPLR 3101,* and to the holdings of *Katz v. Posner,* 23 AD 2d 774; *Kay v. Shopwell, Inc.,* 404 N.Y.S.2d 888 (1978).

Faced with these alternatives imposed by the Court, Petitioners were compelled to withdraw the Interrogatories.

In lieu thereof, Petitioners elected to proceed solely on the written notice dated January 4, 1977, to take the depositions upon oral examinations of the Respondents Inland Credit Corporation, Ardisco Financial Corporation, Plantation House & Garden Products, Inc. and Stern on January 21, 1977.

The Court thereupon advanced the date of the oral depositions from January 21, 1977 to January 10, 1977, and further directed that Petitioners defer the oral depositions of the Respondents Dane and Greenstein, until the completion of the oral examination of the Respondent Stern, and to apply for the deposition of the latter two Defendants at that time.

In pursuance of the Court's direction, the Petitioners promptly completed the oral deposition of Stern, as directed by the Court, on January 10 and 11, 1977, in accordance with the limitations aforestated.

On January 17, 1977, Petitioners' counsel again requested the Court's permission to take the deposition of Respondents Oscar Dane and Harold Greenstein. Respondents' counsel, arbitrarily and contrary to law, opposed the motion as follows:

> "This case is based upon two conversations of which the Plaintiffs were present. We have a summary proceeding here. They are not entitled as a matter of law to a deposition, or to any other kind of disclosure. It's within the discretion of the Court". (Transcript, January 17, 1977, p. 36).

Though the Court granted the right of oral deposition to the Petitioners, it arbitrarily circumscribed and limited the examination "to what occurred on that date (December 6, 1974) on these premises (16 East 65th Street, New York, N.Y.)." (Transcript January 17, 1977, pp. 38-39) — just as theretofore the Court had arbitrarily limited the Petitioners' application for depositions of all the Respondents to the Respondent Stern sole-

ly, and that "if you wanted the examination of anybody else you would have to show a basis for it." (pp. 38-39)

The Court thereupon set the case down for trial for January 21, 1977 (p. 48).

On January 20, 1977, the Petitioners completed the oral depositions of Dane and Greenstein, albeit within the artitrary limitations, as directed by the Court.

On January 21, 1977, the Court finally directed the Respondents to file an answer to Petitioners' motion for disclosure as to the Respondents' Dane and Greenstein, in which motion "the Plaintiffs sought disclosure as to the events which transferred throughout the entire course of the fraud and conspiracy alleged in the complaint commencing from on or about February 1972, culminating on or about December 11, 1975, the date of the fraudulent sale under a purported referee's deed and foreclosure, as specifically alleged in the complaint (pars. 23-28 incl.)". (Reply Aff. Aaron Nussbaum, Feb. 4, 1977, p. 3).

In obstructive opposition to Petitioners' motion for depositions of Dane and Greenstein, the Respondents' attorney stated, *inter alia*, at p. 3, as follows:

> "The entire basis of this sham and frivolous case, which has burdened this Court for nearly a year, is apparently set out in paragraph 16 of the amended verified complaint. In substance, those plaintiffs allege that Inland, by Dane and Greenstein, 'tricked' Inspiration and thusly caused it to deliver a deed in lieu of foreclosure. They allege a so-called agreement with Inland under which Inspiration agreed to so deliver the deed and a copy of which is attached to the complaint as Exhibit 'A'. In reality, that 'agreement' is nothing more than an unsigned copy of a letter sent by Inland to Mrs. Rager but altered by illegible and unintelligible scribblings of Edward Rager. These defendants have the temerity to allege that this piece of scrap paper constitutes an agreement between Inland and Inspiration." (Aff. Abelson, Jan. 27, 1977)

(Flatly contradictory to counsel's misstatements, the depositions theretofore taken of the Respondents Dane and Greenstein on January 20, 1977, both acknowledged that the agreement, had in fact been signed by the Respondents Inland and Oscar Dane at the very time the Petitioners had conveyed their deed to them on December 6, 1974).

In the interim, on January 18, 1977, Mr. Justice Evans had rendered his decision and order denying Petitioners' motion for a jury trial.

On January 24, 1978, the Petitioners thereupon applied to the Appellate Division, First Department, for an interim stay pending the determination of an appeal from Judge Evans' order. However, in view of the fact that Mr. Justice Evans, *sua sponte,* on January 24, 1977, adjourned and continued the trial to May 9, 1977, the Petitioners thereupon withdrew the motion in this Court, for an interim stay, as no longer necessary.

On May 9, 1977, the Rsepondent Edward Rager, acting *pro se*, submitted a series of motions to Mr. Justice Evans, as follows: to adjourn the trial; to postpone a criminal prosecution entitled *People v. Edwina Rager,* pending in the District Court of Suffolk County, arising out of a wage claim, involving property The Rose Fair, Inc., which criminal prosecution was a direct consequence of the Respondents' fraud; to quash a subpoena in the case entitled *Paragon Oil v. Rose Fair, Inc.* and to dismiss that action; to stay an action involving one Forman Bullock, Edwina Rager and Edward Rager against Gaspare Butera. Mr. Justice Evans denied these motions on the ground that the actions relating thereto were not properly before him (Transcript May 9, 1977, pp. 14-22).

On said May 9, 1977, Mr. Justice Evans denied the Petitioners' request for a reasonable adjournment of the trial, upon the ground that the Petitioner Edwina Rager had suffered a paralytic stroke and was presently incapacitated. The Petitioners submitted a medical report certifying that she had been under treatment since March 7, 1977. Petitioners' trial counsel, Joseph M. Meehan, Esq., stated to the Court:

> "Mrs. Rager is in Court and she is prepared to submit to any questions that Your Honor may have; and also, if Your Honor sees fit, she is prepared to undergo any medical examination you may deem advisable." (Transcript of Proceedings May 9, 1977, p. 4).

Further, the Court denied Petitioners' request for a reasonable adjournment of the trial, rejecting Petitioners' contention that the expected decision of the Appellate Division, First Department, as to the right to jury trial, was now imminent, and that Petitioners should not be subjected to the "possible expense involved in having to re-litigate this case in the event of reversal by the Appellate Division." (Trans. May 9, 1977, p. 5)

Further, the Court denied Petitioners' request for an adjournment upon the ground that the Respondents had not as yet returned the signed transcripts of the examinations before trial theretofore taken of the Defendants Inland Credit Corporation, Oscar Dane, Stanley Stern and Harold Greenstein, in January 1977. (Trans. May 9, 1977, pp. 3-4)

The Court thereuipon took an inquest, and rendered its decision granting to Inland an order of dispossess, with ten days stay of execution, and dismissed the counteclaims and affirmative defenses interposed by the Defendant Edwina Rager in the dispossess proceeding of the consolidated Civil Court action. (Transcript May 9, 1977, pp. 21-57)

Subsequently, however, on May 19, 1977, the Appellate Division, First Department, modified the order of Judge Evans, entered January 18, 1977, and held that Appellant Edwina Rager was entitled to a jury trial in the summary proceeding (*Action No. 2*). (57 AD 2d 800)

Accordingly, on May 31, 1977, Mr. Justice Evans thereupon directed the Respondents to show cause on June 10, 1977 why an order should not be made to vacate the inquest of the Court taken May 9, 1977; and further directed that pending the hearing and determination of the motion, "that the said Defendants, or their attorneys, Dreyer & Traub, Esqs., be restrained and enjoined from submitting or entering an order therein dismissing *Action No. 1,* and the Affirmative Defenses and Counterclaims interposed by the Respondent Edwina Rager in *Action No. 2.*"

The affidavit of Defendants' counsel submitted in support of the order to show cause granted by Judge Evans on May 31, 1977, as aforestated, further set forth, as follows:

> "Upon the original application for a reasonable adjournment made on May 9, 1977, your deponent's co-counsel Mr. Meehan respectfully represented to the Court that the plaintiff Edwina Rager had suffered a mild paralytic stroke, and was and is presently incapacitated. On that occasion, Mr. Meehan submitted a medical report by Dr. Wallis stating that Mrs. Rager had been in treatment since March 27, 1977 (Plaintiffs' Exhibit 1), duly offered to submit Mrs. Rager for examination by a court-appointed physician.
>
> On May 23, 1977 Mrs. Rager was again examined by Dr. C. Pinckney Deal, 660 Park Avenue, New York City, who confirmed that she suffered a cerebral infarction in February 1977, and now suffers a 'partial left facial (VII) and hypoglossal (XII) nerve paresis, and a partial motor paresis of the right arm and leg', and Dr. Deal further stated that Mrs. Rager suffers from hypertension, that "she should not undergo a protracted trial at this time, and that the trial 'should be postponed at least until six months after the initial infarction, and/or her blood pressure is under strict control.' A true copy of Dr. Deal's report, dated May 23, 1977, is hereto annexed, marked *Exhibit B.*"

On June 15, 1977, over objection of Petitioners, Mr. Justice Evans adjourned the trial of the case to October 15, 1977, and directed that the Petitioner Edwina Rager, pay into Court the sum of $2,000. monthly, the first payment to be made on June 20, 1977. If not paid by that date, "the case would go to trial on Monday, June 20." (Transcript, June 15, 1977, p. 3)

In this connection, the Respondents had submitted to the Court an affidavit falsely representing that Inland Credit Corporation had expended over $200,000. "in the upkeep and maintenance of the premises since it took title in March 1976." (Aff. Abelson, June 15, 1977, p. 2). In truth, however, neither the Respondent Inland Credit Corporation, nor anyone in its behalf, spent a penny for the maintenance and upkeep of the

property ever since it acquired title to the property under the fraudulent judgment of foreclosure on December 11, 1975.

Further, said the Court, pp 3-4:

> "If that is done as I told you earlier today, the case will be tried in October. Both cases will be tried. I will allow you to try the jury case in summary proceeding first. If, on the other hand, the money is not put in the adjournment is not granted. The case will go to trial on Monday June 20th. You still can go ahead with the jury if you wish. We will try the jury issue first. If, on the other hand, you are unable to proceed with the jury issue because you say that Mrs. Rager was unable to be here; she may be your chief witness. You told me you have some fifteen or so other witnesses is that right, Mr. Nussbaum?
>
> MR. NUSSBAUM: Yes.
>
> THE COURT: We will then proceed with the non-jury issue. I think its called action jnumber one, and take that before the Court and I will give you time to have your witnesses in or out because the court trial, we are a little more flexible.
>
> If Mrs. Rager cannot come to court with her testimony the Court will be prepared to go wherever she is, in bed, home or hospital and take the testimony there. That's an inconvenience to the Court but I think it would be fair to the parties. I will let you make that determination. The jury trial if she is prepared to go ahead and non-jury trial if she doesn't want to come to court and an adjournment on a monthly basis, month by month up to October 15th so long as she or some money is put up and paid to the Clerk of the court. I granted your motion in that manner."

Petitioner Edwina Rager managed to make three payments of $2,000. each into court, totalling $6,000., but was unable to continue these payments because of her incapacitating physical illness.

Subsequently, instead of expeditiously moving for trial herein, Respondents filed a voluminous motion for summary judgment, both in the Supreme Court, New York County and in the Supreme Court, Suffolk County, in order to avert a jury

trial on the issues of fraud, embraced in the virtually identical pleadings of each action.*

On March 6, 1978, likewise, Respondents moved in the Supreme Court, New York County, for summary judgment in *Actions Nos. 1 and 2,* herein, "on the ground that the complaint in *Action No. 1* and the Affirmative Defenses and Counterclaims in the answer of *Action No. 2* do not raise triable issues of fact." (Notice of Motion, March 6, 1978)

In opposition thereto, Petitioners duly submitted detailed Answering Affidavits, Exhibits and documentary evidence amply establishing material triable issues of fact, which precluded the granting of summary judgment (*CPLR 3212(b)*).

Following the motion for summary judgment by Respondents, the Petitioner Edward Rager, *pro se* — again, without foreknowledge of counsel — sent an 8-page affirmation, dated April 15, 1978, to the Court in opposition to the motion for summary judgment, in which he again reiterated his motion to disqualify Mr. Justice Evans (p. 7).

The Arbitrary and Capricious Dismissal of Petitioners' Causes of Action "With Prejudice on the Merits"

On June 12, 1978, counsel for the parties appeared before Mr. Justice Evans for oral argument of the Respondents' motion for summary judgment. However, *sua sponte,* the Court suddenly averted disposition of the motion for summary judgment as follows:

> "Rather than try the motion, I think it's just as expeditious to set it down for trial." (Trans. June 12, 1978, p. 2)

*Summary judgment was granted against Petitioners by the Supreme Court, Suffolk County on January 13, 1979. On April 2, 1979 the Appellate Division, Second Department, affirmed "on the opinion of Mr. Justice Underwood at Special Term, dated December 1, 1977." (Appendix H, 18a-22a). Leave to appeal to the New York Court of Appeals was denied, without opinion, on July 10, 1979. A Petition for a Writ of Certiorari will be duly presented to this Court.

On June 12, 1978, counsel for Petitioners submitted to the Court a medical certificate dated June 7, 1978 from Dr. A. Georg Fleischer, New York University Medical Center, Institute of Rehabilitation Medicine, Dr. Howard Rusk's Institute, reading as follows:

> "To Whom It May Concern: Re: Mrs. Edwina Rager. Mrs. Edwina Rager has been under my care for rehabilitation medicine for the last several months. The present working diagnosis is transient ischemic attacks due to faulty blood circulation affecting the right side of her body. Her family physician, Dr. Wallace, and neurologist Dr. Jerome Block, and I are investigating the etiology of these attacks.
>
> At the present time, she is undergoing extensive medical evaluation procedures and since I feel that these attacks can be preceded by tension or anxiety, I do not feel that she can participate in any physical or mental strenuous activities for a minimum of four months. Sincerely yhours, A. Georg Fleischer, M.C."

Petitioners' counsel thereupon stated to the Court, at p. 24:

> MR. NUSSBAUM: ***May it please the Court, I already submitted to the Court the medical certificates respecting the physical condition of Mrs. Rager that it is extremely precarious for her to go to trial. She is now under treatment and care of the New York Institute for Rehabilitation. I understand as of today Mrs. Rager informed me that she is there and will be there this afternoon for brain scanning observation to determine the nature of her paralysis on the side of her body. For that reason, Your Honor, it would be dangerous for her to go to trial, and a medical certificate from the Institute has been submitted to the Court and read into the record."

The record further shows the ensuing colloquy with the Court:

> "THE COURT: Is she confined to the hospital or the home?

MR. NUSSBAUM: No, Your Honor, but I am informed that she has suffered a recurring paralysis of the condition, if Your Honor please, that was made to the Court in a certificate which I respectfully request permission to read into the record.

THE COURT: Prior to this?

MR. NUSSBAUM: Prior to this, Your Honor. On May 23, 1977, Dr. C. Pinckney Deal, Jr., 660 Park Avenue, New York, N.Y. May 23, 1977. 'To Whom It May Concern: Re: Edwina Rager. I have examined the above patient on this date. She gives a history of having had a left sided cerebral infarction in February·1977, following an emotional shock after receiving some bad news. She did not consult a physician at that time, but she did consult a physiotherapist, and today has gained back probably 75 per cent of the function of the right upper and lower extremitieis.

Examination today reveals the lady to be hypertensive, and to have the residual weaknesses of a left cerebral infarction: e.g. a partial left facial (VII) and hypoglossal (XII), nerve paresis and a partial motor paresis of the right arm and leg.

Although this patient is now under therapy, it is my feeling, particularly since the initial episode was brought on by an emotional shock, and presumably therefore, by a rise in blood pressure, that she should not undergo a protracted trial at this time.

Ideally, this should be postponed at least until six months after the initial infarction, and/or her blood pressure is under strict control. Sincerely yours, C. Pinckney Deal, M.D.'

THE COURT: That was a little over a year ago.

MR. NUSSBAUM: Yes, sir. If Your Honor please, I submit that the prognosis of Dr. Deal that he made in this letter that I read to you, that since that time she does suffer recurrent paralysis. I am just afraid, your Honor, that the tension of the trial may produce a serious danger to her.

THE COURT I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you

may do. I will give you oral permission to do that, if you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all.

MR. NUSSBAUM: Your Honor, may I consult with her before Your Honor puts this down?

THE COURT: We have a specific date." (Trans. pp. 4-6)

Petitioners' counsel further requested the Court for a reasonable adjournment to obtain new trial counsel. The Court denied any adjournment on that ground, as well (p. 7).

The record shows as follows:

"MR. NUSSBAUM: ***Now, I am not a trial lawyer, your Honor. I never tried a case. Your Honor, I have been an assistant district attorney for 25 years in the Appeals Bureau and never tried a case during those years and I have been out of the DA's Office now since January '73, and my specialty is criminal appeals. And again I haven't tried a case during the years I have been out. Now, your Honor, for me to take over a case of this kind, it's just unfair.

THE COURT: I am setting it down, gentlemen, for June 19, ten o'clock, to proceed with all the witnesses you have. If you need a little more time for Mrs. Rager's testimony, I may grant it then or you can take her testimony by deposition. If you have any other witnesses you can proceed with them. Gentlemen, ten o'clock Monday morning for trial." (Trans. June 12, 1978, pp. 7-8).

The Court thereupon set the case down for trial for Monday, June 19, 1978 (pp. 8-10), and then advanced it by directing counsel to select a jury on June 14, 1978, over Petitioners' objection (pp. 11-12).

The Court then adjourned the trial of the case to Thursday, June 15, 1978 (p. 12). On that day, new trial counsel, Irving B. Schleimer, Esq., requested the Court for an adjournment to September 1978, and duly submitted an affidavit of prior engagements. The Court denied the application for adjournment to new counsel.

Petitioners' counsel further advised the Court that Respondents had failed to complete the depositions before trial taken on January 10, 1977; that, in fact, the signed transcript of Respondent Greenstein's deposition had not as yet been returned to the Petitioners; that although the depositions of the Respondents Dane and Stern were finally turned over "this morning", the said transcripts are incomplete, in that "there are a total of 13 unanswered questions, which blanks were left and despite my repeated demands for the insertion of these answers that we requested in the EBTs even the EBTs that were returned to me this morning fail to contain a single addition, or insertion." (p. 26)

Petitioners' counsel put into evidence a letter dated February 9, 1978, sent to Respondents' attorney, reading as follows:

> "Mr. Meehan has informed me that he has not received from you the signed depositions in the examinations before trial taken on January 10, 11 and 20, 1977 of the defendants Stanley E. Stern, Harold Greenstein, and Oscar Dane, respectively.
>
> Pursuant to CPLR 3116, I would appreciat it greatly if you will forward the signed depositions to me at the earliest possible date. The depositions should contain the insertions and exhibits indicated at the following papges thereof:
>
> pp. 11, 15, 23, 26, 29, 33(2), 47, 59, 50, 63(2), 69, 73, 74 and 87.
>
> Many thanks for your prompt response to this matter as again requested."

Petitioners' counsel then stated to the Court, at p. 27:

"MR. NUSSBAUM: Your Honor, we are unprepared, your Honor, on the basis of the fact that we do not have the EBTs which contain some very valuable admissions which were referred to in the answering papers, the motion for summary judgment. That's how important they are.

So, your Honor, for these reasons I respectfully submit that in order to give the plaintiff their day in Court, your Honor, in this most important case upon which their very lives are at stake — Mr. Schleimer said the defendant will not be prejudiced at all for the reason that if they are right, even if they are right with respect to the New York property, they took over this property on the basis of second mortgage where we will have an equity of $175,000, your Honor —

THE COURT: I don't want to hear the merit of the case.

MR. NUSSBAUM: I am not going into the merits.

By reason of the same fraud which not only involves this property, but also the property in Suffolk County, the identical fraud that is involved here, as a result of that we have lost our property and flower growing retailing business, your Honor, which was worth over a million dollars.

THE COURT: When was the motion for summary judgment in that Suffolk County case rendered? Do you have the date?

MR. NUSSBAUM: Yes, I have. As I have carefully pointed out in answer to the summary proceeding in this court, your Honor, the motion for summary judgment in this Court, with all due deference to the judgment granting summary judgment in Suffolk County, there is an appeal now pending, and I submit, your Honor, there is absolutely no legal basis for the granting of that summary judgment.

Just one final thing. The defendant could have brought their case on for trial a long time ago, but instead of that, your Honor, they have brought — they have challenged me every inch of the way with technical proceed-

ings. With respect to the consolidation and then they unconsented to it, carried me through every Court in this state. With respect to jury trials your Honor knows I had to go to the Appellate Division. (pp. 27-29)

And further at pp. 30-31:

"MR. NUSSBAUM: Yes. With respect to the prejudice. I wanted to add that they have our flower business in Suffolk. This is the flower business which they are now operating through their own wholly —

THE COURT: That is not before me.

MR. NUSSBAUM: As a matter of prejudice. They have taken our business and they are making profits now, day by day here, during the pendency of this trial. Therefore, how have they been prejudiced in any way? They have taken our income our livelihood and our property, and how are they prejudiced? I am very anxious for a quick trial, but these are the facts (pp. 30-31).

Petitioners' counsel further stated, at pp. 39-41:

"MR. NUSSBAUM: ***Now your Honor did direct that Mrs. Rager pay $2,000. and Mrs. Rager made every human effort to comply with your Honor's direction. I don't know how she was able to do it. She is a sick woman and in her sickness, your Honor, she managed to produce three payments of $2,000. each which was deposited in this Court, your Honor, but then, your Honor, on top of everything else that she has to provide for, she has some income from, from the rental of some units in this building. In order to make the $2,000 payments, naturally where else was it going to come from? And also she tried to make some money as a stenographer. And your Honor, in maintaining this building in the meantime she has undergone tremendous expenses. She put a new roof on there. I understand about $5,000. She has the plumbing bill of which she owes about $2,500. There is arrears of the electricity on this building. There is an elevator bill. She pays — it's a tremendous elevator bill, which she owes a lot of money. She pays $100 a month maintenance. She tells me

that she supports Dr. Rager in his illness in Canada at the rate of $500 a month. I don't know how this woman eats.

I would want to say in addition to having not received a fee, I have the case on a contingent basis, really in the interest of justice, and Mr. Schleimer is taking part in this case and I commend him. Your Honor, Mrs. Rager owes me $500 in petty disbursements that I have advanced and there is nothing I can do about it. I simply have to wait and, therefore, your Honor, it is just impossible, it is just impossible for her to carry on with these payments." (pp. 39-41).

Petitioners' counsel further informed the Court that the reason he did not move to compel the return of the signed depositions was because Respondents' counsel had, in the interim, moved for summary judgment in both Action No. 1, and in the Suffolk County action; further, because Respondents' counsel had promised to comply with the demand therefor (p. 27); and further, because Respondents had filed a motion for summary judgment in Suffolk County on June 10, 1977, contending tha the abortive May 1977 inquest, taken against the Petitioners on May 9, 1977, was dispositive of that action, as well (p. 36).

The Court thereupon directed Petitioner to proceed to trial on the "equity" case (*Action No. 1*) without a jury, and "severed the Civil Court case, which is a jury case" (*Action No. 2*) (p. 42).

"THE COURT: Yes. My reason for doing that is a very simple one. In an equity case we don't have a jury and I can take the 15 witnesses. Bring them in and you can bring Mrs. Rager in next week or anytime and she would have her day in court in a short time. I told you that we will try the jury case when the equity case is finished. You would have all of your rights to a jury."

* * * * *

Bring your witnesses in. You will have your right to a jury trial. We will proceed now with your equity case. You will either proceed with your equity case or that will be dismissed and the Civil Court case will be sent back.

MR. NUSSBAUM: Your Honor, I have listened carefully to your Honor and with the utmost deference and

with all due respect to the Court I wish to make the following response:

In the first place we now have trial counsel, Mr. Irving Schleimer, with respect to any kind of a case that your Honor would put on. We are unable to go to trial. Mr. Schleimer needs a little time to prepare this case. He stated his position. That's a matter of record.

THE COURT: I am not granting him leave to try this case. You can try the case. ***'' (pp. 43-44)

Petitioners' counsel thereupon objectd to the deprivation of the right to a jury trial by the trial Court:

"MR. NUSSBAUM: *** Your Honor, for you to put the Supreme Court on for trial without a jury first ahead of the summary proceeding in which the Appellate Division has already determined and found that we are entitled to a jury trial, would in effect nullify the plaintiffs of their right to a jury trial because it is possible, your Honor, that since the two actions are identical with the two causes of action in the Supreme Court now before your Honor, they are absolutely identical, the pleadings and the facts and the fraud are identical, should your Honor decide, and I'm not predicting what happened here, should your Honor decide against the plaintiffs, that would be res judicata, and the Appellate Division has already held that would be res judicata of the summary proceeding and, therefore, we would be completely out of court. We would lose our property. We would have no right of action and all that, and that would deprive us of our day in court and that the Appellate Division has found that we have a right.

THE COURT: You are not getting a jury trial because the issues are the same. You are going to have your jury trial on the summary proceeding in the Civil Court.

MR. NUSSBAUM: What I have said to your Honor should your Honor determine against the plaintiffs in the non-jury trial, that will be res judicata.

THE COURT: Of course it will.

MR. NUSSBAUM: So, therefore, we would no longer have a right to a jury trial in the summary judgment.' ' (pp. 45-46) (emphasis supplied)

Further, at p. 47:

MR. NUSSBAUM: Judge, they started the summary proceeding and we counterclaimed and set up these affirmative defenses and counterclaims in the Civil Court. That happened first, your Honor.

THE COURT: You will have a right —

MR. NUSSBAUM: Which we have a right to a jury trial.

THE COURT: You will have a jury trial in the Civil Court.''
(p. 47)

The Court thereupon dismissed Action No. 1 "*with prejudice on the merits*" and severed the Civil Court action (Action No. 2), and remanded it to the Civil Court for a jury trial.

Consequently, on July 31, 1978, instead of placing the summary proceeding on the calendar of the Civil Court for immediate trial, as directed by Mr. Justice Evans, aforesaid, Respondent Inland suddenly abandoned that proceeding and instead, obtained an order to show cause at Special Term, Supreme Court, New York County, within the original mortgage foreclosure proceeding, for a Sheriff's writ of assistance to put the Respondent into possession of premises 16 East 65th Street, New York, N.Y., pursuant to *New York Real Property Action and Proceedings Law Sec. 221.*

On September 1, 1978, Mr. Justice Evans rendered a decision denying Petitioner's cross-motion to vacate the judgment of mortgage foreclosure on the dual grounds of (a) excusable default, and (b) fraud, pursuant to *New York Civil Practice Law and Rules 5015(a)(1)* and *(3)*, respectively, and further holding *inter alia*, as follows:

"The summary proceeding, seeking possession, and the Supreme Court action seeking to set aside the foreclosure on the ground of fraud, were consolidated for trial, by order dated September 16, 1976.

The consolidated case came on for trial in June, 1978; at which time the Supreme Court action was dismissed with prejudice; and the summary proceeding was severed and remitted to the Civil Court.

Since the allegations in the Supreme Court action, which were the same as the counterclaims and defenses alleged in the answer in the summary proceeding were dismissed with prejudice, they may no longer be relied upon in that proceeding either as a defense or as a counterclaim.

The defendants have appealed from the dismissal of their action to set aside the foreclosure proceeding, and according to the affidavit of their attorney, that appeal is still pending although no details of its status have been set forth.

Since the granting of a writ of assistance is discretionary, it would be a proper exercise of discretion to deny the application, with leave to renew either at the conclusion of the appeal, or at an earlier date if the appeal is not promptly prosecuted.

The cross motion to vacate the judgment of foreclosure and for other relief is denied." (Emphasis supplied)

(Appendix B, pp. 4a-7a)

In the interim, in view of the Respondents' election to evict Petitioner Edwina Rager by a Sheriff's Writ of Assistance in the Supreme Court, as aforestated, Petitioner moved to dismiss the Respondents' summary proceeding in the Civil Court.

On September 15, 1978, the Civil Court (Mr. Justice Ribaudo) duly granted Petitioners' motion, rendering decision as follows:

> "The Court has read the voluminous papers together with the memorandum submitted by the parties and after reading the same has come to the conclusion, that this motion to dismiss this summary proceeding should be and is granted.
>
> The respondents' arguments have persuaded the Court that the petitioner's application to the Supreme Court for a writ of assistance precludes this proceeding. Petition dismissed and the counterclaim is severed pending the appeal."

(Appendix L, p. 55a)

REASONS FOR GRANTING THE WRIT

I. The arbitrary dismissal of Petitioners' causes of action "with prejudice and on the merits", without a trial and without fair opportunity to be heard, is in fundamental conflict with the due process clauses of the State and Federal Constitutions.

In the absence of any demonstrable neglect, let alone any *unreasaonble* neglect or delay in proceeding to trial, the state trial Court abused its power and discretion as a matter of due process of law, in dismissing the complaint "with prejudice and on the merits", without a trial and without opportunity to be heard.

In holding to the contrary, the state court violated judicial precedents appertaining thereto, and deprived Petitioners of their property in violation of the due process clauses of the state and federal constitutions. (*Headley v. Noto,* 22 N.Y.2d 1; 237 N.Y.2d 871; *Greenberg v. DeHart,* 4 N.Y.2d 511; *Mink v. Kerin,* 291 N.Y. 300).

In *Societe Internationale v. Rogers,* 357 U.S. 197, the Supreme Court stated:

> "* * * there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merit of his cause."

Accord: *Weinstein-Korn-Miller, NY Civil Practice,* Sec. 3126.13 "Constitutional Limits on Dismissal."

In *Hovey v. Elliott,* 167 U.S. 409, the Court stated at p. 418, quoting *Galpin v. Page,* 18 Wall. 350:

> "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial deter-

mination; and is judicial usurpation and oppression, and can never be upheld where justice is justly administered."

In *Gramatan Home Investors Corp. v. Lopez,* 46 NY 2d 48 (1979), the New York Court of Appeals stated:

> "One of the fundamental principles of our system of justice is that every person is entitled to a day in court *** Considerations of due process prohibit personally binding a party by the results of an action in which that party has never been afforded an opportunity to be heard (*Postal Tel. Cable Co. v. Newport,* 247 U.S. 464, 476, 38 S.Ct. 566, 62 L.Ed. 1215)."

In *Young v. Regan,* 337 U.S. 236, the Court stated:

> "More than a question of state procedure is involved when a state court of last resort closes the door to any question of a claim of denial of a federal right."

In *Fuentes v. Shevin,* 407 U.S. 657, at p. 80, the Court stated:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment — to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference. See *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552."

The history of the proceedings in the state court, as set forth in the Statement of the Case (*supra*), culminating in the

arbitrary dismissal of Petitioners' causes of action "with prejudice and on the merits", completely belied any claim or contention that the Petitioners were culpable of any neglect whatsoever, let alone unreasonable neglect, in proceeding to trial.

From the very inception of the litigation, Respondents' own obstructionist tactics to Petitioners' fundamental right to a jury trial, to their statutory rights of Disclosure, and to Consolidation—all of which were eventually won by Petitioners after arduous motions and appeals and stays in the state court—that were solely responsible for the long delay in the trial of Petitioners' causes of action.

Petitioners were unable to proceed to trial on June 15, 1978 because of the undisputed incapacitation of Edwina Rager, who had initially suffered a cerebral infarction in February 1977, following an emotional shock, with resulting paralysis, as documented in a medical report dated May 23, 1977. She suffered a serious recurrence of her paralytic condition several months prior to June 1978, at which time she was still suffering from "transient ischemic attacks" affecting the right side of her body. The *undisputed* medical prognosis was that "these attacks can be preceded by tension or anxiety"; further, in the undisputed medical opinion dated June 7, 1978, submitted to the Court by the Institute of Rehabilitation Medicine, the "Rusk Institute", the Petitioner Edwina Rager should not "participate in any physical or mental strenuous activities for a minimum of four months" (Appendix M & N, pp. 56a-57a).

In considering the duty of a plaintiff to prosecute an action with diligence, the settled rule is that the illness of a party must be given due consideration in any application for an adjournment of the trial. (*Sortino v. Fisher,* 20 A.D.2d 25 (1st Dept.)' *DeRosa v. Nezolek,* 24 A.D.2d 1055; *Parker v. Stiriz,* 7 A.D.2d 647; *Vittorino v. City of New York* (1st Dept.) 22 A.D.2d 883; *Wolf v. Associates Discount Corp.,* 12 A.D.2d 241).

In *Sortino v. Fisher, supra,* the Court stated:

> "There are circumstances beyond the control of plaintiff and his lawyer, including disabling personal catastrophies that may prevent quick recovery from the delays initiated by such catastrophies (e.g., *Wolf v.*

Associates Discount Corp., 12 A.D.2d 241, 209 N.Y.S.2d 877; *Zeiger v. Kew Towers, Inc.*, 8 A.D.2d 827, 190 N.Y.S.2d 93 (2nd Dept.)."

The fact is that neither the Court nor Respondent disputed, or even questioned, the veracity of the Petitioner Edwina Rager's incapacitating illness. Indeed, the trial court implicitly acknowledged the actuality of her illness by offering to take her deposition, in colloquy as follows (June 12, 1978, p. 6):

> "MR. NUSSBAUM: *** If your Honor, please. I submit that the prognosis of Dr. Deal that he made in this letter that I read to you, that since that time she does suffer recurrent paralysis. I am just afraid, your Honor, that the tension of the trial may produce a serious danger to her.
>
> THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, if you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all."

II. The dismissal "with prejudice and on the merits" is in direct conflict with New York's explicit legislative policy, and with the state's judicial precedents thereunder, that there can be no dismissal on the merits, except for unreasonable neglect or delay in the prosecution of an action (New York Civil Practice Law and Rule 3216(a), Headley v. Noto, 22 NY 2d 1; 237 N.E.2d 871).

The positive legislative command of *CPLR 3216* is that a dismissal "*is not on the merits*", unless the order specifies otherwise.

There can be no dismissal on the merits, except for *unreasonable* neglect or delay in the prosecution of an action. (*Headley v. Noto, supra*). There, the New York Court of Appeals construed CPLR 3216(a) as follows:

> "It certainly should be within the power of a trial court to dispose of a case 'on the merits and with prejudice' where it has been adequately demonstrated that a plaintiff *unreasonably* neglected to prosecute an action." (emphasis supplied)

III. The extraordinary pattern of rulings adverse to Petitioners, stemming from an extrajudicial source, clearly reflected a disqualifying bias and prejudice by the state court against Petitioners depriving them of due process of law.

The grossly provocative telegrams addressed to the trial judge by Petitioner Edward Rager, *pro se*, on January 5, 1977, at the very outset of Judge Evans' assignment to the case, requesting his personal disqualification because of "better (s.i.c., bitter) enmity by your father in battle participated by Judge Mangan then my employee, also your appearance during Paderewski hearings before Bieber, unconscionable evil enemy, framer contempt against me, partner Bullock, other wrongs", could not but have gravely incited and prejudiced the Court against Petitioners.

As an inevitable result, the Court's adverse rulings immediately reflected a pattern of bias and prejudice plainly "manifesting a closed mind" against Petitioners, and deprived them of a fair opportunity to be heard upon the merits, from the very inception of the proceedings (*United States v. Grinnell Corp.*, 384 U.S. 563, 583).

Thus, the Court arbitrarily and capriciously:

> (a) denied Petitioner's absolute right of Discovery through the use of Interrogatories, limiting Petitioners to oral depositions only, a ruling directly contrary to *New York Civil Practice Law and Rule 3101;*
>
> (b) unduly limited and circumscribed the Petitioners' oral depositions of Respondents to the events transpiring at 16 E. 65th Street, New York and which occurred on December 6, 1974, only. "And if there is going to be an ex-

amination, as I said *it will be limited to that date and those premises.*" (Trans. Jan. 17, 1977, pp. 38-39);

(c) unduly restricted Petitioners' rights of Disclosure under *CPLR Art. 31* initially, by limiting the oral depositions to the Respondent Stanley Stern only, even though oral depositions were requested of all five Defendants. "I allowed you solely the examination of Mr. Stanley Stern. And I said if you wanted the examination of anybody else you would have to show a basis for it." (p. 39)

(d) cavalierly rejected a medical affidavit certifying the incapacitating illness of Petitioner Edwina Rager, by stating: "It looks like low back pain to me." (Trans. May 9, 1977, p. 5), despite the offer by Petitioners' counsel, as follows:

"MR. MEEHAN: ***With respect to the health of Mrs. Rager, I have a copy of an affidavit of Dr. Robert Wallis, M.D., and I have copies for Your Honor. Let the record indicate that I provided Mr. Abelson with a copy.

Mrs. Rager is in court and she is prepared to submit to any questions that Your Honor may have; and also, if Your Honor sees fit, *she is prepared to undergo any medical examination you may deem advisable.*" (Trans. May 9, 1977, p. 48; emphasis supplied);

(e) unfairly denied Petitioners' application for a reasonable adjournment based on the following grounds: (1) Petitioner Edwina Rager's disabling physical condition (Transcript of Proceedings, May 9, 1977, p. 4, 49-51); (2) the Respondents' wilful failure and refusal to return to Petitioners the signed depositions taken in examinations before trial, as required by New York Civil Practice Law and Rules, Article 31; and (3) that the trial should be adjourned because the decision on Petitioners' appeal to the Supreme Court, Appellate Division, First Department, concerning the vital issue of a jury trial, was now imminent, and that Petitioners should not be forced to undergo the expense involved "in having to relitigate this case in the event of reversal by the Appellate Division" (Trans. May 9, 1977, pp. 4-5).

The trial judge summarily took an inquest against Petitioner Edwina Rager, and granted a final order of eviction, with

10 days stay of execution. (Transcript of Proceedings, May 9, 1977, p. 55).

However, on May 19, 1977, the Appellate Division reversed Judge Evans, and directed that Petitioner was entitled to trial by jury as to Action No. 2 (57 App. Div. 2d 800).

(f) unfairly denied Petitioners' application for a reasonable adjournment upon the ground that Petitioner Edwina Rager had suffered a recurrence of her paralytic condition, and on the further ground that Respondents had not yet returned the signed deposition before trial taken of the Respondent Greenstein, nor had Respondent completed the signed depositions taken of the other Respondents by Petitioners (Trans. June 15, 1978);

(g) diametrically contrary to the Court's own prior decision, Mr. Justice Evans capriciously held on September 1, 1978 that the counterclaims and defenses in the severed Civil Court Action No. 2 "may no longer be relied upon in that proceeding" in view of the Court's purported dismissal of Action No. 1 (Appendix B, p. 6a) — despite the clear and unequivocal transcript of proceedings held on June 15, 19078 absolutely confirming that Action No. 2 had been remanded to the Civil Court for a jury trial as to all issues, including the defenses and counterclaims therein (Appendix O, pp. 58a-59a).

(h) the arbitrary denial of Petitioners' cross-motion to vacate Respondents' fraudulent judgment of foreclosure by default, upon the dual grounds of (1) "excusable default", and (2) "fraud, misrepresentation, or other misconduct of an adverse party", within the contemplation of *New York Civil Practice Law and Rule 5015(a)*, despite the fully documented evidence presented below of both excusable default and of fraud.

The documented evidence of Edward Rager's mental derangement throughout the course of the foreclosure proceedings, constituting excusable default, is conclusively reflected in the official court records and in the judicial opinions of three Justices of the Supreme Court of the State of New York during the course of the foreclosure proceedings, as well as in

the admissions by the Respondents themselves, concerning the Petitioner's serious mental illness in their sworn examinations before trial.

The documented evidence of fraud consisted of the written agreement on the letterhead of Respondent Inland Credit Corporation, signed December 6, 1974; the admissions by Respondents in examinations before trial that that agreement was signed at the same time that the Petitioners' deed was transferred to Respondents; the related signed agreement of November 27, 1974, not to foreclose the Flowervale property; the huge sign placed by Respondents on Petitioners' property publicly offering to lease the property at 16 East 65th Street, New York, directly contrary to the terms of the December 6th agreement — which sign remains in Petitioners' custody and possession as an exhibit to be offered in any trial.

(i) the insupportable finding by the State court below that: "No fraud on the Court has been shown (Appendix B, p. 7a), is absolutely contradicted by the fact that the Respondents' letter-agreement of December 6, 1974, and the transfer of Petitioners; deed to Respondents "in lieu of foreclosure", had never been brought to the attention of the foreclosure court by the Respondents, at any time;

(j) the court's arbitrary finding that "There is no basis for this motion to vacate the judgment of September 9, 1975, *or the sale which followed*" (emphasis supplied) (Appendix B, p. 7a) without any hearing whatsoever, is utterly inexplicable in light of the unequivocal affidavit presented to the Court by Petitioners, in support of the Complaint, paragraphs 29-37 *Action No. 1* (Appendix K, p. 41a) and paragraphs 3-12 in *Action No. 2* (Appendix J, p. 28a), absolutely attesting under oath that the affiant was a ready, willing and able buyer of the foreclosed premises, and that he had duly appeared at the advertised time and place for such purpose, but found no one there. (Appendix P, p. 60a).

refs

In *United States v. Grinnell Corp., supra,* the Court stated:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the juidge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31."

In *Commonwealth Corp. v. Casualty Co.,* 393 U.S. 145, 150, the Court stated:

> "*** any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias."

Actuated by bias and prejudice plainly manifested against Petitioners by the trial judge throughout the proceedings below, the grossly arbitrary dismissal of Petitioners' causes of action "with prejudice and on the merits," without fair opportunity to be heard, deprived the Petitioners of due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States.

CONCLUSION

For these reasons, it is prayed that a writ of certiorari issue to review the order and judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department.

Respectfully submitted,

AARON NUSSBAUM
16 Court Street
Brooklyn, New York 11241
Counsel for Petitioners

August 20, 1979

APPENDIX "A"
ORDER AND JUDGMENT DATED JULY 6, 1978

At a Trial Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, 60 Centre Street, Borough of Manhattan, City and State of New York, on the 6th day of July, 1978.

PRESENT:
HON. MARTIN EVANS,
Justice

ACTION NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Plaintiffs

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Defendants.

ACTION NO. 2

INLAND CREDIT CORPORATION,

Petitioner,

-against-

EDWINA RAGER,

Respondent.

UPON the reading and filing of the summons and amended complaint in Action No. 1 hereinabove, duly verified the 12th day of April, 1976, the notice of petition and petition in Action No. 2 hereinabove, duly verified the 1st day of March, 1976, the amended answer to the said petition of the respondent in Action No. 2 hereinabove, duly verified the 12th day of April, 1976, and upon all the pleadings and proceedings heretofore had herein, and this matter having come on for trial before the Hon. Martin Evans on the 15th day of June, 1978, and the defendants in Action No. 1 and petitioner in Action No. 2 having been ready to proceed to trial and the plaintiffs in Action No. 1 and respondent in Action No. 2 having failed and neglected to proceed to trial,

NOW, upon the motion of Olshan, Grundman & Frome, attorneys for defendants in Action No. 1 and petitioner in Action No. 2, it is hereby

ORDERED, that Action No. 2, heretofore consolidated with Action No. 1 by order of this Court (Tyler, J.) dated and filed September 16th, 1976, be and the same hereby is, severed and remanded back to the Civil Court of the City of New York, County of New York, under Civil Court Index No. L&T34070, and it is further

ORDERED, ADJUDGED AND DECREED, that the two causes of action in the amended complaint in Action No. 1 be, and the same hereby are, dismissed with prejudice and upon the merits, and it is further

ORDERED, ADJUDGED AND DECREED, that defendants Inland Credit Corporation, Ardisco Financial Corporation, Stanley E. Stern, Oscar Dane and Harold Greenstein, with a place of business at 685 Fifth Avenue, New York, New York,

do recover of plaintiffs, Inspiration Enterprises, Inc., Edwina Rager and Edward Rager, whose address is 16 East 65th Street, New York, New York the sum of $350.00 as taxed by the Clerk of this Court, which amount is hereby adjudged to the said defendants for their costs and disbursements in this action, with interest on that amount from the date of this judgment, and that defendants shall have execution therefor.

ENTER

s/M.E.
J.S.C.
s/Norman Goodman, Clerk

Filed July 17, 1978
New York County Clerk's Office

APPENDIX "B"
ORDER DATED 9/1/78

PRESENT:
HON. MARTIN EVANS
Justice

INLAND CREDIT CORP.

-against-

INSPIRATION ENTERPRISES INC.

The following papers numbered 1 to 24 read on this motion August 18, 1978, submitted No. 81 on Calendar of

Order to Show Cause and Affidavits Annexed, papers numbered 1-2.

Answering Affidavit, Cross Motion, papers numbered 3-21.

Replying Affidavit, papers numbered 22-23.

Sur Reply Affidavit, papers numbered 24.

Upon the foregoing papers this motion and cross motion are decided in accordance with memorandum opinion and order.

Dated September 1, 1978
s/M.E.
J.S.C.
Filed September 7, 1978

OPINION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

INLAND CREDIT CORPORATION,

Plaintiff,

-against-

INSPIRATION ENTERPRISES, INC.,
EDWARD RAGER, EDWINA RAGER, et al,

Defendants.

MARTIN EVANS, J.:

This is an application under RPAPL 221 for an action in the nature of a writ of assistance, to put the purchases of real property in a foreclosure sale, into possession.

The foreclosure action was commenced in February, 1975 and resulted in a judgment of foreclosure entered on October 28, 1975. The premises had been owned by a corporation, and one of the corporate stockholders was, and still is in possession of the premises.

In March, 1976 the purchaser, who had been the plaintiff in the foreclosure proceeding, commenced a summary dispossess proceeding in the Civil Court, against the resident stockholder.

The following day, the corporation and its stockholders commenced an action in the Supreme Court seeking to set aside and vacate the judgment of foreclosure, and the sale, on various grounds of fraud.

The amended answer of the respondent in the summary proceeding contained, as a defense and counterclaim, an allegation that the sale was not conducted properly, in accordance with the requirements of RPAPL 231; a second affirmative defense and counterclaim set up the same grounds of fraud that were alleged in the Supreme Court action, and a third defense and counterclaim sought damages from the improper sale, alleged in the first defense, and from the fraud alleged in the second.

The summary proceeding, seeking possession, and the Supreme Court action seeking to set aside the foreclosure on the ground of fraud, were consolidated for trial, by order dated September 16, 1976.

The consolidated case came on for trial in June, 1978; at which time the Supreme Court action was dismissed with prejudice; and the summary proceeding was severed and remitted to the Civil Court.

Since the allegations in the Supreme Court action, which were the same as the counterclaims and defenses alleged in the answer in the summary proceeding were dismissed with prejudice, they may no longer be relied upon in that proceeding either as a defense or as a counterclaim.

The defendants have appealed from the dismissal of their action to set aside the foreclosure proceeding, and according to the affidavit of their attorney, that appeal is still pending, although no details of its status have been set forth.

Since the granting of a writ of assistance is discretionary, it would be a proper exercise of discretion to deny the application, with leave to renew either at the conclusion of the appeal, or at an earlier date if the appeal is not promptly prosecuted.

The cross motion to vacate the judgment of foreclosure and for other relief is denied.

Defendants were adequately apprised of the commencement of the foreclosure action and chose to default in appearance.

Plaintiffs had the right to foreclose on the security, to

secure their loan. No fraud on the Court has been shown. Defendant admits that she spoke to the Justice of this Court before whom the foreclosure proceeding was pending, prior to the entry of judgment. There is no basis for this motion to vacate the judgment of September 9, 1975, or the sale which followed.

The foregoing constitutes the decision and order of this Court.

Dated: 9/1/78

s/M.E.
Martin Evans, J.S.C.

Filed September 7, 1978

APPENDIX "C"
ORDER DATED APRIL 24, 1979

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 24, 1979

Present:
Hon. Theodore R. Kupferman, Justice Presiding
Hon. Harold Birns
Hon. Leonard H. Sandler
Hon. Arthur Markewich
Hon. Samuel J. Silverman, Justices

Inspiration Enterprises, Inc.,
Edwina Rager and Edward Rager,

Plaintiffs-Appellants,

-against-

Inland Credit Corporation, Ardisco Financial Corporation, Stanley E. Stern, Oscar Dane and Harold Greenstein,

Defendants-Respondents,

Inland Credit Corporation,

Petitioner-Respondent,

-against-

Edwina Rager,

Respondent-Appellant.

Inland Credit Corporation,

Plaintiff-Respondent,

-against-

Inspiration Enterprises, Inc.,
Edwina Rager and Edward Rager,

Defendants-Appellants.

Appeals having been taken to this Court by the plaintiffs-appellants in Action No. 1 (Appeal No. 1) from a judgment of the Supreme Court, New York County (M. Evans, J.), entered on July 18, 1978 dismissing Action No. 1 on the merits and severing Action No. 2 and remanding it to the Civil Court, New York County for trial, and by the defendants-appellants in Appeal No. 2 from an order of said court entered on September 7, 1978, denying plaintiff's motion for a Sheriff's writ of assistance with leave to renew at the conclusion of the appeal herein and denying appelants' cross-motion for an order vacating a judgment of foreclosure.

And said appeals having been argued by Mr. Aaron Nussbaum, of counsel for the appellants and by Mr. Richard H. Abelson, of counsel for the respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment and order so

appealed from be and the same hereby are affirmed. Respondents shall recover of appellants one bill of $75 costs and disbursements of these appeals.

ENTER:
Joseph J. Lucchi
Clerk

APPENDIX "D"
ORDER DATED MAY 24, 1979

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 24, 1979

Present:
Hon. Harold Birns
Justice Presiding
Hon. Leonard H. Sandler
Hon. Arthur Markewich
Hon. Samuel J. Silverman
Justices

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER and EDWARD RAGER,

Plaintiffs-Appellants,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE AND HAROLD GREENSTEIN,

Defendants-Respondents,

INLAND CREDIT CORPORATION,

Petitioner-Respondent,

-against-

EDWINA RAGER,

Respondent-Appellant.

INLAND CREDIT CORPORATION,

Plaintiff-Respondent,

-against-

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER AND EDWARD RAGER,

Defendants-Appellants.

The above-named appellants having moved for reargument of, or for leave to appeal to the Court of Appeals from the order of this Court entered on April 24, 1979,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied in all respects with $20 costs.

ENTER:

Joseph J. Lucchi
Clerk

APPENDIX "E"
ORDER DENYING LEAVE TO APPEAL TO COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Tenth day of July, A.D. 1979

PRESENT:
HON. LAWRENCE H. COOKE
Chief Judge, presiding.

Mo. No. 669

Edwina Rager and Edward Rager,

Appellants,

vs.

Inland Credit Corporation,
Ardisco Financial Corporation, & ors.,

Respondents.

(& ano. action — Inland Credit Corporation
v. Edwina Rager)
(Appeal No. 1)

& ano. appeal — Inland Credit Corporation
v. Inspiration Enterprises, Inc., et al.

A motion for leave to appeal to the Court of Appeals and for a stay in the above causes having heretofore been made

upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from so much of the order of the Appellate Division as affirmed an order in "Action No. 2", be and the same hereby is dismissed upon the ground that that portion of the order does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is otherwise denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic.

s/Donald M. Sheraw
Donald M. Sheraw
Deputy Clerk

APPENDIX "F"
AGREEMENT DATED NOVEMBER 27, 1974

Inland Credit Corporation
685 Fifth Avenue
New York, N.Y.

Gentlemen:

This letter shall constitute our agreement as follows.

1. Whenever used in this agreement, the word "Consolidation" shall mean and include the consolidation and extension agreement between us dated May 5, 1972, recorded in the Office of the Suffolk County Clerk on May 10, 1972 in Volume 6356 at page 131, and the mortgages covered thereby.

2. All payments of interest otherwise payable on the Consolidation between now and April 30, 1975 shall be deferred to and become payable with the unpaid principal balance of the Consolidation. However, interest from May 1, 1975 shall be payable on May 31, 1975.

3. To induce you to grant this extension to us and in consideration thereof,

3.01 we acknowledge and confirm that the unpaid principal balance of the Consolidation is $91,805.81 and that no interest installments have been made on that sum since October 1, 1974;

3.02 all payments of principal and interest on any mortgages senior in lien to the Consolidation shall be paid as and when they become due;

3.03 all real estate taxes covering the property described in the Consolidation will be kept current and paid as they become due;

3.04 we will comply with all of the other terms and conditions of the Consolidation.

3.05 if the aforementioned conditions are met the mortgage will be extended to August 31, 1975.

4. All of the terms, covenants and conditions of the Consolidation, as modified by this agreement, shall remain in full force and effect and shall apply to any defaults under paragraph 3 hereof or under the provisions of the Consolidation.

5. This agreement cannot be changed or terminated orally.

Very truly yours,
FLOWERVALE, INC.

By:
Edwina Rager, President

The undersigned, as guarantors of the Consolidation, consent to the execution and delivery of the foregoing agreement.

Edwina Rager

Edward Rager

Accepted and Agreed to
INLAND CREDIT CORPORATION
By: s/Oscar Dane
Chairman

APPENDIX "G"
LETTER DATED DECEMBER 4, 1974

INLAND CREDIT CORPORATION
685 FIFTH AVENUE · NEW YORK, N.Y. 10022 · (212) 687-3400

re Flowervale: No default unless Suburbia grants ~~no~~ extension and intends to foreclose

December 4, 1974

Mrs. Edwina Rager, President
Inspiration Enterprises, Inc.
29 Maple Street
Blue Point, Long Island

with leave to Edward Rager to use his efforts to effect an advant ageous sale

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Credit Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of proper sign on building and diseminating information to brokers and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interest and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage...

leave to occupy the premises from time to time

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

first and second Mtge and has med as hereinbefore and

Very truly yours,

INLAND CREDIT CORPORATION

Oscar Dane
Chairman of the Board

OD:mes

OVER TWENTY-FIVE YEARS OF SUCCESSFUL REAL ESTATE & COMMERCIAL FINANCING

APPENDIX "H"
OPINION BELOW

SPECIAL TERM PART I

SUPREME COURT, SUFFOLK COUNTY

FLOWERVALE, INC., EDWINA RAGER
AND EDWARD RAGER,

Plaintiffs-Appellants,

-against-

INLAND CREDIT CORPORATION,
PLANTATION HOUSE & GARDEN PRODS. INC.,
STANLEY E. STERN, OSCAR DANE AND
HAROLD GREENSTEIN,

Defendants-Respondents.

UNDERWOOD, JR. J.S.C.
December 1, 1977

DREYER AND TRAUB
Attorneys for Defendants
90 Park Avenue
New York, N.Y. 10016

AARON NUSSBAUM, ESQ.
Attorney for Plaintiffs
16 Court Street
Brooklyn, New York 11241

Defendant Inland Credit Corporation (hereinafter referred to as Inland) held a subordinate mortgage on property located in Bayport, Suffolk County which was owned by Flowervale, Inc. (hereinafter referred to as Flowervale). Inland commenced a foreclosure action and Flowervale defaulted in answering. The property was then sold at a public auction to Inland. Inland received a referee's deed dated January 28, 1976, and it subsequently sold the property to a co-defendant Plantation House and Garden Products, Inc., the present owner of the property.

To use plaintiffs' analysis of their complaint " . . . the salient allegations of the complaint centering around Exhibit A which spell out the essential elements of fraud in the procurement of the judgment of foreclosure by default. *Exhibit A* is a letter dated December 4, 1974 from Inland to plaintiff Edwina Rager, and the typed portion of the letter states *inter alia* "you will sign a deed to the above property in lieu of foreclosure." The property mentioned in the agreement-letter was property located in New York County and not the Suffolk County property owned by Flowervale. Plaintiffs signed a deed to the New York County property. A foreclosure action was also commenced against the New York County property.

Plaintiff Edward Rager states that he was ". . . seriously ill emotionally, mentally and physically . . . and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs . . . and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs."

Plaintiffs further state that the "fraudulent object and intent of the defendants was to acquire all of the plaintiffs' right, title and interest in and to the New York, as well as the Suffolk properties, at a fractional part of their actual worth or market value . . . and further, effectively deprived and wrongfully prevented the plaintiffs from effecting a sale of the premises upon the most advantageous terms pursuant to the terms thereof." General allegations of defendants' fraudulent acts to

deceive and defraud the plaintiffs are mentioned.

The court determines, after careful review of the complaint, the detailed affidavits and exhibits, that defendants' motion for summary judgment should be granted because there are no issues that warrant a trial.

Plaintiffs state that the complaint alleges "fraud in procurement of the judgment of foreclosure by default." Flowervale was duly served with the summons and complaint in the foreclosure action, and it defaulted in answering. Plaintiffs were also notified of every stage of the foreclosure proceedings and could have protected their equity in the property. Plaintiffs' reply, as previously noted, that because of plaintiff Edward Rager's condition, he could not defend the foreclosure action. Plaintiffs do not submit medical reports or other documentary evidence to establish Edward Rager's condition, which is required under the facts of this case, to successfully oppose a motion for summary judgment. Furthermore, although Rager is an attorney, he could have hired another attorney to represent plaintiffs. Additionally, his wife, plaintiff Edwina Rager, who was not incapacitated, could have hired another attorney.

Plaintiffs also contend that the agreement-letter specifically states that defendants would not foreclose if plaintiffs gave a deed to certain property to defendants. The "property" mentioned is the New York County property and not the Suffolk County property. Plaintiffs further allege that "the pen insertions by Mr. Rager stipulated that . . . there was to be no default declared as to the Flowervale property unless Suburban (Bank) grants no extension and intends to foreclose." Plaintiffs allege that Suburban did not foreclose.

The court cannot read the language added to the agreement from the copy submitted to it. Furthermore, plaintiff Edward Rager admits that he "penned" in the additions. Plaintiffs cannot show that defendants ever agreed to this insertion. Certainly, plaintiff Edward Rager, an attorney, who owned substantial real property, knew that his "penned" insertions, without more, did not constitute a valid and binding contract.

Plaintiffs next contend that the Appellate Division, First Department has "implicitly upheld" the "sufficiency of the within cause of action . . . " (see: *Inspiration Enterprises Inc. v. Inland Credit Corporation* 54 AD 2d 839 leave to appeal granted 55AD2d 527 appeal dismissed 40 N.Y.2d 1014, 41 NY2d 901). This is not so. The court ruled on the propriety of an order which denied a motion to remove and consolidate, and an order which denied a motion for a *pendente lite* injunction. The court did not rule on the question of the sufficiency of the complaint because there was no order addressed to the sufficiency of the complaint before the court. The court would not *sua sponte* decide this question.

Plaintiffs are faced with another obstacle. They moved to vacate their default in the foreclosure action, which they could do. (see e.g. *Mills v. Nedza* 222 App. Div. 615), and their motion was denied. Justice Pittoni, on September 3, 1975 stated *inter alia,* "the moving affidavit in support of this motion fails to set forth facts indicating a reasonable excuse for the default, nor does it present a factual basis for a meritorious defense." Plaintiffs did not appeal Justice Pittoni's decision. The complaint in this action is very similar to the defenses contained in plaintiffs' proposed answer annexed to their affidavit in support of their motion to vacate, which Justice Pittoni held did not present a "meritorious defense."

The doctrine of estoppel or res judicata under the facts of this case is applicable to the order of Justice Pittoni as though it were a final judgment. (see e.g. *American Equitable Corp., v. Parkhill* 252 App. Div. 260; cf. *Weissberger v. Weissberger* 266 App. Div. 973; *Baronowitz v. Baronowitz* 13 Misc. 2d 404).

Whether the alleged fraud committed by defendants is labelled intrinsic or extrinsic (see *5 Weinstein-Korn-Miller N.Y. Civ. Prac. par. 5015.09),* plaintiffs have failed to establish by sufficient proof that there is an issue to be tried. (cf. *Priester v. Sigmond* 48 AD2d 988)

Summary judgment has been recently utilized even in negligence cases when there is no issue to be tried (*Andre v. Pomeroy 35 NY2d 361)* and, to borrow a phrase from that case, this case is " . . . ripe for summary judgment." (*Id at 365*)

Settle judgment.

APPENDIX "I"
NOTICE OF PETITION

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

INLAND CREDIT CORPORATION

Petitioner,

-against-

EDWINA RAGER,

Respondent.

TO THE RESPONDENT ABOVE NAMED AND DESCRIBED, EDWINA RAGER, IN POSSESSION OF THE PREMISES HEREINAFTER DESCRIBED OR CLAIMING POSSESSION THEREOF:

PLEASE TAKE NOTICE that a hearing at which you must appear will be held at the Civil Court of the City of New York, County of New York, at 111 Centre Street, County of New York, City and State of New York, on March 16th, 1976, at 9:30 A.M. on the annexed petition of Inland Credit Corporation, verified on March 1, 1976, which prays for a final judgment of eviction, awarding to the petitioner the possession of all parts of the premises, 16 East 65th Street, New York, N.Y., whic are occupied by you, as demanded in the petition which you must answer. Your answer may set forth any defense *or counterclaim* against the petitioner.

TAKE NOTICE that if you fail to interpose and establish any defense that you may have to the allegations of the petition.

you may be precluded from asserting such defense or the claim on which it is based in any other proceeding or action.

In the event of your failure to answer and appear, final judgment by default may be entered against you for the relief demanded in the petition.

Dated: March , 1976

s/
Clerk of the Civil Court of
the City of New York

NATANSON, REICH & BARRISON
Attorneys for Petitioner
655 Third Avenue, New York, N.Y. 10017
Telephone: (212) 490-3470

PETITION

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

INLAND CREDIT CORPORATION,

Petitioner,

-against-

EDWINA RAGER

Respondent.

The Petition of Inland Credit Corporation respectfully alleges:

1. Petitioner is the owner of the real property at 16 East 65th Street, New York, New York (the "Realty") and is authorized to maintain this proceeding under §713(5) of the Real Property Actions and Proceedings Law, for the possession of those parts of the Realty occupied by the Respondent.

2. Petitioner acquired title to the Realty pursuant to a judgment of foreclosure and sale, in an action entitled "Inland Credit Corporation, Plaintiff, vs. Inspiration Enterprises Inc. et al., Defendant (Supreme Court, New York County, Index No. 2166/75)" (the "Foreclosure Action").

3. The Realty is situated within the territorial jurisdiction of the Civil Court of the City of New York, County of New York.

4. Respondent, Edwina Rager is in possession of parts of the Realty.

5. On February 19, 1976 Petitioner caused service to be made upon the Respondent of a 10 day notice to quit the Realty and caused to be exhibited to the Respondent at the same time the original deed to the Realty which had been delivered to the Petitioner in the Foreclosure Action.

6. Copies of the deed in the Foreclosure Action, and the notice to quit with affidavit of service attached, are annexed hereto, made a part hereof and marked Exhibits A and B.

7. More than 10 days have elapsed since the service of the notice to quit and exhibition of the deed described in paragraph 6 hereof but the Respondent has failed and refused to quit the Realty.

WHEREFORE, Petitioner respectfully requests that a final judgment be entered awarding to the Petitioner possession of those parts of the premises in the Realty occupied by the Respondent together with the costs and disbursements of this proceeding; and that a warrant issue to remove the Respondent from the Realty.

Dated: New York, New York
March 1, 1976

INLAND CREDIT CORPORATION
By s/
Oscar Dane, Chairman
of the Board

SWORN TO
March 1, 1976

DEED

THIS DEED dated the 11th day of December, nineteen hundred and seventy-five between JOSEPH A. FONTANELLI, JR., Referee duly appointed in the action hereinafter mentioned, Grantor

and INLAND CREDIT CORPORATION, a New York Corporation, with its principal office at 685 Fifth Avenue, New York, N.Y. 10022, Grantee

WITNESSETH, that the Grantor, the Referee appointed in an action between Inland Credit Corporation, plaintiff and Inspiration Enterprises, Inc. et al., defendants, consolidated into a single lien by a consolidation agreement foreclosing mortgages recorded on the 9th day of May, nineteen hundred and seventy-two in the office of the City Register of the County of New York, in Reel 239 of mortgages, at page 1547 in pursuance of a judgment entered at a special term of the Supreme Court of the State of New York held in and for the County of New York, on the 28th day of October, nineteen hundred and seventy-five and in consideration of One Hundred Dollars paid by the Grantee being the highest sum bid at the sale under said judgment does hereby grant and convey unto the Grantee, TO HAVE AND TO HOLD the premises herein granted unto the Grantee, its successors and assigns forever.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal, the date first above written.

s/Joseph A. Fontanelli, Jr.
Joseph A. Fontanelli, Jr., Referee

In Presence of:
H. E. Fontanelli

APPENDIX "J"
AMENDED ANSWER AND
DEMAND FOR JURY TRIAL

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

INLAND CREDIT CORPORATION,

Petitioner,

-against-

EDWINA RAGER,

Respondent.

The respondent, EDWINA RAGER, respectfully answers the petition herein as follows:

1. Denies each and every allegation contained in paragraphs 1 and 2 of the petition.

2. Denies each and every allegation contained in paragraph 5 of the petition, except that respondent admits that the petitioner caused service to be made upon the respondent of a ten day notice to quit, without exhibiting to the respondent at the same time the original deed to the Realty.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
AND COUNTERCLAIM

3. The respondent, EDWINA RAGER, is the president of INSPIRATION ENTERPRISES, INC. (hereinafter called INSPIRATION), a corporation duly organized under the laws of the State of New York, and together with her husband, EDWARD RAGER, are the sole stockholders of INSPIRATION.

4. Petitioner purportedly acquired title to the Realty pursuant to a judgment of foreclosure and sale, in an action entitled "Inland Credit Corporation, Plaintiff, vs. Inspiration Enterprises, Inc., et al, Defendant (Supreme Court, New York County, Index 2166/75").

5. That subsequently, pursuant to the judgment of foreclosure against INSPIRATION, as aforestated, the mortgaged premises 16 East 65th Street, New York, New York, were directed and authorized to be sold in one parcel at public auction at the Rotunda of the New York County Courthouse, 60 Centre Street, New York, New York, by and under the direction of Joseph A. Fontanelli, Jr., who had been thereby appointed Referee for that purpose.

6. That the said judgment of foreclosure further directed that the Referee give public notice in the New York Law Journal of the time and place of the sale, pursuant to *Section 231 of the Real Property Actions and Proceedings Law and Rule 660.15 of the Rules of the New York County Supreme Court,* per *Exhibit A,* hereto annexed.

7. Upon information and belief, such public notice of the sale as aforesaid was last published in the New York Law Journal on November 28, 1975, announcing the date of public sale of the foreclosed premises to be December 5, 1975.

8. Upon information and belief, that on said December 5, 1975, a seriously interest willing and able buyer of the purportedly foreclosed mortgaged premises did appear at the time and place advertised in the notice of sale aforestated for the purpose of suitable bidding thereat, but neither the Referee in Foreclosure nor the petitioner INLAND CREDIT, nor any person acting in their behalf, were then and there physically present, or otherwise, and no postponement or adjournment of the sale or other public announcement had been made or posted at that time and place, as aforestated.

9. Upon information and belief, the sale of the mortgaged premises was illegally adjourned and postponed by or on behalf of the defendants from December 5, 1975 to December 11.

1975, without any public notice thereof or by readvertising as required by *Section 231, subd. 3, of the Real Property Actions and Proceedings Law,* and without any further notice to the respondent whatsoever.

10. That subsequently, upon information and belief, the sale of the mortgaged premises was purportedly effected and consummated on December 11, 1975, by a purported Referee's Deed in Foreclosure dated that date between Joseph A. Fontanelli, Jr., Referee, and INLAND CREDIT CORPORATION, as Grantee, and said Referee's Deed was purportedly acknowledged before a Notary Public on December 19, 1976.

11. That by reason of the facts aforestated, the Referee's sale of the mortgaged premises aforesaid, and the purported deed from the Referee to INSPIRATION, are wholly null and void, and should be cancelled of record, on the ground that the defendants failed to comply with the applicable statutes governing the public sale of mortgaged property under foreclosure.

12. That by reason of the facts aforestated, the petitioner is not legally entitled to maintain this proceeding as the lawful owner of the premises aforestated.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE AND COUNTERCLAIM

13. That at all times hereinafter mentioned, INSPIRATION is and was the owner of the premises, 16 East 65th Street, New York, New York, and the fair market value and the reasonable worth of the said real property and premises is in the approximate sum of Four Hundred Fifty Thousand ($450,000.) Dollars.

14. Heretofore and for many years past, and at all the times hereinafter mentioned, the respondents EDWARD RAGER and EDWINA RAGER were likewise the sole owners and stockholders of FLOWERVALE, INC., hereinafter called FLOWERVALE, a New York corporation actively engaged in the growth, nurturing and sale of horticultural products; that

FLOWERVALE consisted of approximately seven and one half acres of land, located in Bayport, Islip Township, Suffolk County, State of New York, of the market value and reasonable worth of approximately Five Hundred Thousand ($500,000.) Dollars, and further consisted of various buildings, residences and greenhouses containing about 50,000 square feet of glass of the fair market value and reasonable worth, together with the good will thereon, of the approximate sum of Five Hundred Thousand ($500,000.) Dollars, for a total fair and reasonable value and worth of FLOWERVALE, INC. in the approximate sum of One Million ($1,000,000.) Dollars.

15. At all the times hereinafter mentioned, upon information and belief, the petitioner INLAND CREDIT is a corporation organized under the laws of the State of New York.

16. That heretofore, and on May 2, 1972, the Petitioner INLAND issued a second mortgage loan to INSPIRATION covering the property at 16 East 65th Street, New York, New York, on a consolidated mortgage, in the amount of $160,000., subject to a reduced first mortgage lien thereon in the original amount of approximately $140,000., and the respondent EDWINA RAGER and her husband signed a mortgage note guaranty in favor of the petitioner to the extent thereof.

17. That heretofore, on the same date, May 2, 1972, the petitioner INLAND CREDIT simultaneously granted a second mortgage loan in the sum of $100,000. to FLOWERVALE, covering the real estate and premises in Suffolk County as aforesaid, subject to a reduced first mortgage lien thereon in the amount of $110,000., and the respondent EDWINA RAGER and her husband signed a mortgage note guaranty in favor of the petitioner to the extent thereof.

18. That heretofore, in or about November 1974, and at all times mentioned herein, the fair and reasonable value and worth of the equity belonging to INSPIRATION ENTERPRISES, INC. in and to its real property situated at 16 East 65th Street, Borough of Manhattan, City and State of New York, was in the

approximate sum of One Hundred Seventy-five Thousand ($175,000.) Dollars.

19. That heretofore, in or about November 27, 1974, and at all the times herein mentioned, the fair and reasonable market value and worth of the equity belonging to the Respondent EDWINA RAGER and EDWARD RAGER, as sole stockholders of FLOWERVALE in Suffolk County, as aforesaid, was in the approximate sum of Eight Hundred Thousand ($800,000.) Dollars.

20. That on December 6, 1974, and commencing some time prior thereto, the petitioner falsely, fraudulently and corruptly tricked and deceived the respondent and her husband into consummating a purported agreement with the petitioner to convey and deed to ARDISCO FINANCIAL CORPORATION, a wholly owned subsidiary, all of the respondent's right, title and interest in and to the real property and premises situated at 16 East 65th Street, in the Borough of Manhattan, City and State of New York, as aforesaid, upon the express representations, as follows:

(a) that such conveyance and deed to ARDISCO was to be in lieu of any foreclosure of either the said INSPIRATION property or of the respondent's FLOWERVALE property in Suffolk County, as aforesaid;

(b) that the petitioner would devote its best efforts to sell the real property at 16 East 65th Street, New York, New York, as aforesaid, at the most advantageous terms, and that the proceeds of the sale thereof would be applied to pay the first and second mortgages of the New York and Suffolk properties aforesaid, together with all accrued interest, real estate taxes and any additional expenses incurred in connection with the sale;

(c) that any surplus remaining after the aforesaid payments would be applied to INLAND for the arrears of interest and taxes on the FLOWERVALE property, and that any surplus beyond that would be used to reduce the principal amount of the FLOWERVALE mortgage;

(d) that the respondent's husband, EDWARD RAGER, would be permitted to exert all reasonable efforts to effect an advantageous sale for the purposes afiresaid;

(e) that the petitioner would exert its best efforts to permit EDWARD RAGER to enter into an annual lease with any prospective buyer, permitting his occupancy of the first and second floors and the vaulted basement in the said premises as theretofore, both as to his residence and law office therein;

(f) that, in any event, the respondent EDWINA RAGER and EDWARD RAGER reserved the right to occupy the first and second floors and basement as heretofore, for a period of sixty (60) days from the date of the proposed sale of the premises; and

(g) that, in the interim, the petitioner would maintain and service the premises and furnish and supply all management, heating, cleaning and repair services and facilities, as shall be necessary, in accord with the purposes aforestated.

21. That the agreement aforesaid was thereupon set forth by memorandum and in writing by INLAND, dated December 4, 1974, a duplicate original of which was signed and initialed by the Chairman of the Board of Inland, OSCAR DANE, on behalf of INLAND on said December 6, 1974, and delivered to EDWARD RAGER at his office on that date, a true copy of which is annexed hereto, marked *Exhibit B.*

22. That further, and prior thereto, in accord with the memorandum of agreement aforesaid, the petitioner likewise entered into a written agreement on November 27, 1974, with the respondent EDWINA RAGER and EDWARD RAGER on behalf of FLOWERVALE, to extend the FLOWERVALE second mortgage to August 31, 1975, and further specifically agreed not to take or institute any foreclosure action against FLOWERVALE prior to May 31, 1975. A true copy of said agreement is hereto annexed, marked *Exhibit C.*

23. That the respondent believed the said representations to be true, and relying upon them in consideration thereof, did on said December 6, 1974, at 16 East 65th Street, New York, New

York, sign and execute a deed theretofore prepared by the said petitioner purportedly conveying all of the respondent's and her husband's right, title and interest of INSPIRATION to its wholly owned subsidiary, ARDISCO, as aforesaid.

24. That subsequently, on December 11, 1974, the said petitioner caused EDWARD RAGER, individually, and as attorney for INSPIRATION, to execute and deliver to ARDISCO, a purported stockholders' consent to the deed from INSPIRATION to ARDISCO, dated December 6t, 1974, as aforestated, to which consent the said EDWARD RAGER added in his own handwriting the following words: "As per letter permitting to stay." A copy of the purported stockholder's consent is hereto annexed, marked *Exhibit D.*

25. That at the times and place aforesaid and to the actual knowledge of the defendants, the said plaintiff EDWARD RAGER was then and there seriously ill emotionally, mentally and physically and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs INSPIRATION ENTERPRISES, INC. and EDWINA RAGER, and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the Respondent or INSPIRATION ENTERPRISES INC.

26. That at all the times hereinafter mentioned, the said petitioners fraudulently and covinously caused, precipitated, aggravated and compounded the mental illness of the plaintiff EDWARD RAGER as aforesaid, in order to prevent, thwart, frustrate and bar the said EDWARD RAGER, both individually and as attorney for the plaintiffs INSPIRATION ENTERPRISES, INC., and EDWINA RAGER, from taking any legal action or counter-action against the petitioners, or from interposing a proper defense or defenses on the merits to any foreclosure action or summary dispossess proceeding against INSPIRATION which the petitioner INLAND CREDIT, then and there fraudulently contemplated taking against the plaintiffs herein, as aforesaid.

27. That in truth and in fact the object of the fraud aforesaid against the respondent EDWARD RAGER and INSPIRATION was to acquire under color of the fraudulent foreclosure and by means of the ARDISCO deed, wrongfully extracted from the respondent, as aforestated, all of her right, title and interest in and to the New York, as well as the Suffolk properties belonging to the respondent, at a fractional part of their actual worth or market value, and that by collusively defrauding and cajoling the respondent and EDWARD RAGER into surrendering the deed to the defendant ARDISCO "in lieu of foreclosure," the said petitioner effectively deprived and wrongfully prevented the respondent EDWARD RAGER and INSPIRATION of and for the capacity to refinance the existing mortgages on both the New York and Suffolk properties, in the open market, and further, effectively deprived the respondent from effecting a sale of the premises upon the most advantageous terms.

28. That immediately subsequent to said December 6, 1974, and during the entire course of the foreclosure proceedings instituted as hereinafter set forth, INLAND CREDIT and its officers STERN, DANE and GREENSTEIN, and each of them, in further effectuation of their intent to deceive and defraud the respondent, as aforesaid, did deliberately thwart INSPIRATION, respondent and EDWARD RAGER from all efforts to sell the property aforesaid, as agreed, and the petitioner did wrongfully and wantonly sabotage, frustrate, defeat and discourage all potential buyers, as well as all potential efforts by INSPIRATION, respondent and EDWARD RAGER, to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, New York, for the agreed purposes aforesaid.

29. That further, in complete bad faith and in effectuation of their intent to deceive and defraud the respondent as aforesaid, the said petitioner INLAND CREDIT repeatedly demanded of the respondent EDWINA RAGER and EDWARD RAGER that they forthwith surrender the possession and occupancy of the premises aforesaid to it; further, the peti-

tioner INLAND CREDIT deliberately and designedly failed and neglected to maintain or service the premises, or to keep it in good repair and appearance; and the said petitioner did deliberately and designedly cut off and vandalize the heating facilities during the freezing temperatures of the winter seasons of 1974, 1975 and 1976, and further permitted a defective condition in the elevator with emission of smoke therefrom for several days causing fire and explosion and resulting in putting the elevator out of commission for approximately two months in or about March or April of 1975; and for about five months during the period of October 1975 up to and including February 1976; and further, permitted and caused the flooding of the premises and the impairment of the ceilings therein; and further, the petitioner INLAND did repeatedly, deliberately and wantonly harass, malign and villify the respondent EDWINA RAGER and EDWARD RAGER and did repeatedly attempt to coerce, badger, intimidate and terrorize them into surrendering the occupancy and possession of the premises to the petitioner, as aforesaid, and did unremittingly persist in engaging in the tactics and devices aforesaid continuously till the present time, all with consequent and deliberate discouragement to potential buyers of the building, and to force the respondent and EDWARD RAGER to surrender and abandon the possession and occupancy thereof.

30. That further, in effectuation of their corrupt intent to deceive and defraud the respondent, as aforestated, the petitioner INLAND CREDIT did on said December 6, 1974, then and there, wrongfully and corruptly steal, purloin, misappropriate and remove from the premises the original signed memorandum of agreement, *Exhibit B,* from the possession and custody of the respondent at the time and place aforestated, and the said petitioner did thereafter wilfully refuse and decline to return the said memorandum of agreement, *Exhibit B,* or to provide a photocopy of the same, despite the repeated demands of the respondent therefor.

31. That notwithstanding the express written representation and agreement not to foreclose the respondent's properties, as aforesaid, the petitioner INLAND CREDIT did on or about January 27, 1975, fraudulently, wrongfully and corruptly institute and prosecute a foreclosure action against the respondent and INSPIRATION ENTERPRISES, INC., in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75, and did by economic threat, coercion and duress, cause the respondent to default thereunder, and did, on October 28, 1975, cause and procure a purported judgment of foreclosure and sale of the mortgaged premises aforesaid; and did on December 11, 1975, cause a purported Referee's Deed in Foreclosure to be conveyed and delivered to the petitioner INLAND CREDIT.

32. That, further, notwithstanding the express representation and agreement not to foreclose either the New York property or the Suffolk County property of the respondent EDWINA RAGER and EDWARD RAGER, as aforesaid, the petitioner INLAND CREDIT did simultaneously, on or about January 29, 1975, wrongfully, fraudulently and corruptly institute a foreclosure proceeding against the FLOWERVALE, INC. property in Suffolk County, under Index No. 75/1968 , and did likewise procure a purported judgment of foreclosure by default therein on October 30, 1975, entered therein on November 28, 1975, and did likewise cause and effectuate the issuance and delivery of a purported Referee's Deed in foreclosure on or about January 7, 1976, to a wholly owned subsidiary corporation belonging to the petitioner, INLAND CREDIT.

33. That by reason of the facts aforestated, the foreclosure action purportedly instituted by INLAND CREDIT against INSPIRATION in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75 is wholly null and void at its inception, in its entirety, on the ground of the fraud and deceit by the petitioner, as aforestated.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE AND COUNTERCLAIM

34. Respondent repeats and re-alleges paragraphs 1 through 33 inclusive with the same force and effect as if set forth in detail herein.

35. That by reason of the facts aforesaid, the respondent and her husband EDWARD RAGER have been seriously damaged in their person and in their property, and have suffered great and permanent economic loss; and that the respondent EDWINA RAGER and EDWARD RAGER have suffered, now suffer, and will continue for an indefinite period in the future great mental anguish, and severe emotional distress and illness, all to petitioner's damage in the sum of Ten Million ($10,000,000.) Dollars for compensatory and punitive damages.

WHEREFORE, the respondent EDWINA RAGER demands judgment dismissing the petition, and judgment in the sum of Ten Million ($10,000,000.) Dollars, compensatory and punitive damages, together with the costs, disbursements and counsel fees of this proceeding.

s/Edwina Rager
EDWINA RAGER

INLAND CREDIT CORPORATION
685 FIFTH AVENUE · NEW YORK, N.Y. 10022 · (212) 687-3400

In Foreclosure: No default grants, no extension and intends to foreclose unless Suburbia

December 4, 1974

Mrs. Edwina Rager, President
Inspiration Enterprises, Inc.
29 Maple Street
Blue Point, Long Island

with leave to Edward Rager to use his efforts to effect an advantageous sale

Re: 16 East 65th Street

Dear Mrs. Rager:

Pursuant to conversation among Mr. Dane, Mr. Greenstein and Dr. Rager, we have agreed as follows:

You will sign a deed to the above property in lieu of foreclosure. This deed will be made to ARDISCO FINANCIAL CORPORATION, which is a wholly owned subsidiary of Inland Credit Corporation. Upon receiving the deed, we and Ardisco Financial Corporation will use its best efforts to sell the property, including placing of proper sign on building and diseminating information to brokers, and from the proceeds of the sale will pay the first and second mortgage and accrued interest, real estate taxes and any additional expenses incurred in connection with the sale. Any surplus after the above payments, it will pay to Inland Credit Corporation for the arrears of interest and taxes on the Flowervale property and any surplus beyond that will be used to reduce the principal amount of the Flowervale mortgage...

leave to occupy the premises

You are granted, upon signing of the deed, sixty (60) days to remove all personal property from the building.

first and second liens and has not as hereinbefore and

Very truly yours,

INLAND CREDIT CORPORATION

Oscar Dane
Chairman of the Board

OD:mes

OVER TWENTY-FIVE YEARS OF SUCCESSFUL REAL ESTATE & COMMERCIAL FINANCING

LETTER DATED NOVEMBER 27, 1974

EXHIBIT C

Dec 11, 74

Ardisco Financial Corporation
685 Fifth Avenue
New York, New York 10022

Gentlemen:

Edwina and Edward Rager are the sole stockholders in INSPIRATION ENTERPRISES INC. and have consented to the signing of a deed to Ardisco Financial Corporation dated December 6, 1974. as per letter permitting to sign

Edward Rager (individually)

Edward Rager, as attorney
for Inspiration Enterprises Inc.

No stockholders consent
on file

APPENDIX "K"
AMENDED VERIFIED COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER and EDWARD RAGER,

Plaintiffs,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Defendants.

The plaintiffs, complaining of the defendants, by AARON NUSSBAUM, their attorney, respectfully show to this Court and allege as follows:

FOR A FIRST CAUSE OF ACTION

1. The plaintiff INSPIRATION ENTERPRISES, INC. (hereinafter called INSPIRATION) is a corporation duly organized under the Laws of the State of New York and maintains its principal office at Sixteen East Sixty-fifth Street, Borough of Manhattan, County, City and State of New York.

2. Heretofore, commencing 1957, and at all the times hereinafter mentioned, the plaintiff INSPIRATION was and still is the owner, in fee simple of the premises, land and real

estate known and designated as Number Sixteen East Sixty-Fifth Street, Borough of Manhattan, City and State of New York, and described as follows:

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at a point on the southerly side of 65th Street, distant 262 feet easterly from the corner formed by the intersection of the southerly side of 65th Street with the easterly side of Fifth Avenue;

RUNNING THENCE southerly, parallel with Fifth Avenue and part of the distance through a party wall, 100 feet 5 inches to the center line of the block between 64th and 65th Streets;

THENCE easterly, along the center line of the block and parallel with 65th Street, 20 feet;

THENCE northerly, parallel with Fifth Avenue and part of the distance through a party wall; 100 feet 5 inches to the southerly side of 65th Street; and

THENCE westerly, along the same, 20 feet to the point or place of Beginning.

The premises aforesaid are known and designated as Block 1379, Section 5, Lot No. 62.

3. At all the times hereinafter mentioned, the fair market value and reasonable worth of real property and premises aforesaid is in the approximate sum of Four Hundred Fifty Thousand ($450,000.) Dollars.

4. At all the times hereinafter mentioned, the plaintiff EDWINA RAGER was and is the president of INSPIRATION, and the plaintiff EDWARD RAGER was and is the secretary thereof, and the said plaintiffs were and are the whole owners and officers and stockholders of INSPIRATION.

5. Heretofore and for many yers past, and at all the times hereinafter mentioned, the plaintiffs EDWARD RAGER and EDWINA RAGER were likewise the sole owners and stockholders of FLOWERVALE, INC., hereinafter called FLOWERVALE, a New York corporation actively engaged in the growth, nurturing and sale of horticultural products; that FLOWERVALE consisted of approximately seven and one half acres of land, located in Bayport, Islip Township, Suffolk County, State of New York, of the market value and reasonable worth of approximately Five Hundred Thousand ($500,000.) Dollars, and further consisted of various buildings, residences and greenhouses containing about 50,000 square feet of glass of the fair market value and reasonable worth, together with the good will thereon, of the approximate sum of Five Hundred Thousand ($500,000.) Dollars, for a total fair and reasonable value and worth of FLOWERVALE in the approximate sum of One Million ($1,000,000.) Dollars.

6. At all the times hereinafter mentioned, upon information and belief, the defendant INLAND CREDIT CORPORATION (hereinafter called INLAND CREDIT) is a corporation organized under the Laws of the State of New York, engaged in the principal business of second mortgage financing of real property.

7. At all the times hereinafter mentioned, upon information and belief, the defendant ARDISCO FINANCIAL CORPORATION (hereinafter called ARDISCO) is a corporation organized under the Laws of the State of New York, and is a wholly owned subsidiary corporation of the defendant INLAND CREDIT.

8. Upon information and belief, at all the times hereinafter mentioned, the defendants INLAND CREDIT and its subsidiary ARDISCO were wholly owned, managed and controlled by the defendants STANLEY E. STERN (hereinafter called STERN) and OSCAR DANE (hereinafter called DANE), and the said defendants STERN and DANE were at all times mentioned herein the sole stockholders of each of the defendant corporations aforesaid.

9. Upon information and belief, at all times hereinafter mentioned, the defendant STERN was the president of the defendant corporations INLAND CREDIT and ARDISCO, and at all times operated under the name and designation of STERN MANAGEMENT for the defendant corporations aforesaid.

10. Upon information and belief, at all times hereinafter mentioned, the defendant DANE was an executive officer and the Chairman of the Board of Directors of the said defendant corporations INLAND CREDIT and ARDISCO.

11. Upon information and belief, at all times hereinafter mentioned, the defendant HAROLD GREENSTEIN (hereinafter called GREENSTEIN), was the Executive Vice-President of the defendant corporations INLAND CREDIT and ARDISCO.

12. That heretofore, and on May 2, 1972, the defendant INLAND CREDIT issued a second mortgage loan to the plaintiff INSPIRATION covering the INSPIRATION property at 16 East 65th Street, New York, New York, on a consolidated mortgage, in the amount of $160,000., subject to a reduced first mortgage lien thereon in the original amount of approximately $140,000.

13. That heretofore, on the same date, May 2, 1972, the defendant INLAND CREDIT simultaneously granted a second mortgage loan in the sum of $100,000. to FLOWERVALE, covering the real estate and premises in Suffolk County as aforesaid, subject to a reduced first mortgage lien thereon in the original amount of $110,000.

14. That heretofore, in or about November 1974, and at all times mentioned herein, the fair and reasonable value and worth of the equity belonging to the plaintiff INSPIRATION in and to its real property situated at 16 East 65th Street, Borough of Manhattan, City and State of New York, and to the plaintiffs EDWINA RAGER and EDWARD RAGER, was in the approximate sum of One Hundred Seventy-five Thousand ($175,000.) Dollars.

15. That heretofore, in or about November 27, 1974, and at all the times herein mentioned, the fair and reasonable value and worth of the equity belonging to the plaintiffs EDWINA RAGER and EDWARD RAGER, as sole stockholders and owners of FLOWERVALE in Suffolk County, as aforesaid, was in the approximate sum of Eight Hundred Thousand ($800,000.) Dollars.

16. That on December 6, 1974, and commencing some time prior thereto, the defendants falsely, fraudulently and corruptly tricked and deceived the plaintiffs into consummating a purported agreement with the defendants to convey and deed to the defendant ARDISCO all of the plaintiffs' right, title and interest in and to the real property and premises situated at 16 East 65th Street, in the Borough of Manhattan, City and State of New York, as aforesaid, upon the express representations:

(a) that such conveyance and deed to ARDISCO was to be in lieu of any foreclosure of either the said INSPIRATION property or of the plaintiffs' FLOWERVALE property in Suffolk County, as aforesaid;

(b) that the defendants would devote their best efforts to sell the real property at 16 East 65th Street, New York, as aforesaid, at the most advantageous terms, and that the proceeds of the sale thereof would be applied to pay the first and second mortgages of the New York and Suffolk properties aforesaid, together with all accrued interest, real estate taxes and any additional expenses incurred in connection with the sale;

(c) that any surplus remaining after the aforesaid payments would be applied to INLAND for the arrears of interest and taxes on the FLOWERVALE property, and that any surplus beyond that would be used to reduce the principal amount of the FLOWERVALE mortgage;

(d) that the plaintiff EDWARD RAGER would be permitted to exert all reasonable efforts to effect an advantageous sale for the purposes aforesaid;

(e) that the defendants would exert their best efforts to per-

mit the plaintiff EDWARD RAGER to enter into an annual lease with any prospective buyer, permitting his occupancy of the first and second floors and the vaulted basement in the said premises as theretofore, both as to his residence and law office therein;

(f) that, in any event, the plaintiffs EDWINA RAGER and EDWARD RAGER reserved the right to occupy the first and second floors and basement as heretofore, for a period of sixty (60) days from the date of the proposed sale of the premises; and

(g) that, in the interim, the defendants would maintain and service the premises and furnish and supply all management, heating, cleaning and repair services and facilities, as shall be necessary, in accord with the purposes aforestated.

17. That the agreement aforesaid was thereupon set forth by memorandum and in writing by the defendant INLAND, dated December 4, 1974, a duplicate original of which was signed and initialed by the defendant DANE on behalf of INLAND on said December 6, 1974, and purportedly delivered to the plaintiff EDWARD RAGER at his office on that date, a true copy of which is hereto annexed marked *Exhibit A*.

18. That further, and prior thereto, in accord with the memorandum of agreement aforesaid, the defendants likewise entered into a written agreement on November 27, 1974, with the plaintiffs EDWINA RAGER and EDWARD RAGER on behalf of FLOWERVALE, to extend the FLOWERVALE second mortgage to August 31, 1975, and further specifically agreed not to take or institute any foreclosure action against FLOWERVALE prior to May 3, 1975. A true copy of said agreement is hereto annexed, marked *Exhibit B*.

19. That the plaintiffs believed the said representations to be true, and relying upon them in consideration thereof, did on said December 6, 1974, at 16 East 65th Street, New York, New York, at the specific request of the defendants INLAND CREDIT, DANE and GREENSTEIN, then and there, sign and execute a deed theretofore prepared by the said defendants pur-

portedly conveying all of the plaintiffs' right, title and interest of INSPIRATION to the defendant ARDISCO FINANCIAL CORPORATION, a wholly owned subsidiary of the defendants, as aforesaid.

20. That subsequently, on December 11, 1974, the said defendants caused the plaintiff EDWARD RAGER, individually, and as attorney for INSPIRATION, to execute and deliver to ARDISCO, a purported stockholders' consent to the deed from INSPIRATION to ARDISCO, dated December 6, 1974, as aforestated, to which consent the said plaintiff EDWARD RAGER added in his own handwriting the following words: "As per letter permitting to stay." A copy of the purported stockholders' consent is hereto annexed, marked *Exhibit c.*

21. That at the times and place aforesaid and to the actual knowledge of the defendants, the said plaintiff EDWARD RAGER was then and there seriously ill emotionally, mentally and physically and was then and there in a greatly unstable, weakened and debilitated mental and physical condition, and was then and there mentally incapable of handling or managing his affairs, either in his individual capacity, or as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, and was then and there mentally incapacitated from protecting the legal and equitable rights belonging to the plaintiffs.

21a. That at all the times hereinafter mentioned, the said defendants fraudulently and covinously caused, precipitated, aggravated and compounded the mental illness of the plaintiff EDWARD RAGER, as aforesaid, in order to prevent, thwart, frustrate and bar the said EDWARD RAGER, both individually and as attorney for the plaintiffs INSPIRATION and EDWINA RAGER, from taking any legal action or counter-action against the defendants, or from interposing a proper defense or defenses on the merits to any foreclosure action or summary dispossess proceeding against the plaintiffs which the defendants, and each of them, then and there fraudulently contemplated taking against the plaintiffs herein, as aforesaid.

22. That at all the times mentioned herein, the defendants,

and each of them, knew the said representations to be false and fraudulent, and knowingly, covinously, collusively and malevolently made such false and fraudulent representations intending to deceive and defraud the plaintiffs of their properties aforesaid.

23. That in truth and in fact, the object of the fraud aforesaid against the plaintiffs was to acquire under color of the fraudulent foreclosure, and by means of the ARDISCO deed wrongfully extracted from the plaintiffs as aforestated, all of their right, title and interest in and to the New York, as well as the Suffolk properties belonging to the plaintiffs, at a fractional part of their actual worth or market value; and further that, by collusively defrauding and cajoling the plaintiff EDWARD RAGER into surrendering the deed to the defendant ARDISCO "in lieu of foreclosure," the said defendants effectively deprived and wrongfully prevented the plaintiffs of and from the capacity to refinance the existing mortgages on both the New York and Suffolk properties, in the open market, and further, effectively deprived the plaintiffs from effecting a sale of the premises upon the most advantageous terms.

24. That immediately subsequent to said December 6, 1974, and during the entire course of the foreclosure proceedings instituted as hereinafter set forth, the defendants and each of them, in further effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, did deliberately thwart the plaintiffs from all efforts to sell the property aforesaid, as agreed, and the defendants did wrongfully and wantonly sabotage, frustrate, defeat and discourage all potential buyers, as well as al potential efforts by the plaintiffs, to find a suitable buyer, or to sell the property at 16 East 65th Street, New York, for the agreed purposes aforesaid.

25. That further, in complete bad faith and in effectuation of their intent to deceive and defraud the plaintiffs as aforesaid, the said defendants repeatedly demanded of the plaintiffs EDWINA RAGER and EDWARD RAGER that they forthwith surrender the possession and occupancy of the premises

aforesaid to ARDISCO: and the said defendants deliberately and designedly failed and neglected to maintain or service the premises, or to keep it in good repair and appearance; and the said defendants did deliberately and designedly cut off and vandalize the heating facilities during the freezing temperatures of the winter seasons of 1974 and 1975; and further permitted a defective condition in the elevator with emission of smoke therefrom for several days causing fire and explosion and resulting in putting the elevator out of commission for approximately two months in or about March or April 1975; and further, permitted and caused the flooding of the premises and the impairment of the ceilings therein; and further, the said defendants did repeatedly, deliberately and wantonly harass, malign and villify the plaintiffs EDWARD RAGER and EDWINA RAGER and did repeatedly attempt to coerce, badger, intimidate and terrorize them into surrendering the occupancy and possession of the premises to the defendants as aforesaid, and did unremittingly persist in engaging in the tactics and devices aforesaid continuously till the present time, all with consequent and deliberate discouragement to potential buyers of the building, and to force the plaintiffs to surrender and abandon the possession and occupancy thereof.

26. That further, in effectuation of their corrupt intent to deceive and defraud the plaintiffs, as aforestated, the defendants did on said December 6, 1974, then and there, wrongfully and corruptly steal, purloin, misappropriate and remove from the premises the original signed memorandum of agreement, *Exhibit A,* from the possession and custody of the plaintiffs at the time and place aforestated, and the said defendants did thereafter wilfully refuse and decline to return the said memorandum of agreement, *Exhibit A,* or provide a photocopy of the same, despite the repeated demands by the plaintiffs therefor.

27. That notwithstanding the express written representation and agreement not to foreclose the plaintiffs' properties, as aforesaid, the defendant INLAND CREDIT did on or about

January 27, 1975, fraudulently, wrongfully and corruptly institute and prosecute a foreclosure action against the plaintiffs in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75, and did by economic threat, coercion and duress, cause the plaintiffs to default thereunder, and did, on October 28, 1975, cause and procure a purported judgment of foreclosure and sale of the mortgaged premises aforesaid; and did on December 11, 1975, cause a purported Referee's Deed in Foreclosure to be conveyed and delivered to the defendant INLAND CREDIT.

28. That further, notwithstanding the express representation and agreement not to foreclose either the New York property or the Suffolk County property of the plaintiffs EDWINA RAGER and EDWARD RAGER, as aforesaid, the defendant INLAND CREDIT did simultaneously, on or about January 29, 1975, wrongfully, fraudulently and corruptly institute a foreclosure proceeding against the FLOWERVALE, INC. property in Suffolk County, under Index No. 75/1968, and did likewise procure a purported judgment of foreclosure by default therein on October 30, 1975, entered therein on November 28, 1975, and did likewise cause and effectuate the issuance and delivery of a purported Referee's Deed in foreclosure on or about January 7, 1976, to a wholly owned subsidiary corporation belonging to the defendants INLAND CREDIT, STERN and DANE.

29. That subsequently, pursuant to the judgment of foreclosure against INSPIRATION, as aforestated, the mortgaged premises 16 East 65th Street, New York, New York, were directed and authorized to be sold in one parcel at public auction at the Rotunda of the New York County Courthouse, 60 Centre Street, New York, New York, by and under the direction of Joseph A. Fontanelli, Jr., who had been thereby appointed Referee for that purpose.

30. That the said judgment of foreclosure further directed that the Referee give public notice in the New York Law Journal of the time and place of the sale, pursuant to *Section 231 of the Real Property Actions and Proceedings Law and Rule 660.15 of the Rules of the New York County Supreme Court.*

31. Upon information and belief, such public notice of the sale as aforesaid was last published in the New York Law Journal on November 28, 1975, announcing the date of public sale of the foreclosed premises to be December 5, 1975.

32. Upon information and belief, that on said December 5, 1975, a seriously interested willing and able buyer of the purportedly foreclosed mortgaged premises did appear at the time and place advertised in the notice of sale aforestated for the purpose of suitable bidding thereat, but neither the Referee in Foreclosure nor the defendant INLAND CREDIT, nor any person acting in their behalf, were then and there physically present, or otherwise, and no postponement or adjournment of the sale or other public announcement had been made or posted at that time and place, as aforestated.

33. Upon information and belief, the sale of the mortgaged premises was illegally adjourned and postponed by or on behalf of the defendants from December 5, 1975 to December 11, 1975, without any public notice thereof or by readvertising as required by *Section 231, subd. 3, of the Real Property Actions and Proceedings Law,* and without any further notice to the plaintiffs whatsoever.

34. That subsequently, upon information and belief, the sale of the mortgaged premises was finally effected and consummated on December 11, 1975, by a purported Referee's Deed in Foreclosure dated that date between Joseph A. Fontanelli, Jr., Referee, and INLAND CREDIT CORPORATION, as Grantee, and said Referee's Deed was purportedly acknowledged before a Notary Public on December 19, 1975.

35. That by reason of the facts aforestated, the foreclosure action purportedly instituted by INLAND CREDIT against INSPIRATION in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75 is wholly null and void at its inception, in its entirety, on the ground of the fraud and deceit by the defendants, as aforestated.

36. That by reason of the facts aforestated, the purported deed and conveyance granted by INSPIRATION to ARDISCO

on December 6, 1974 is wholly null and void on the ground of the fraud and deceit by the defendants as hereinabove set forth.

37. That by reason of the facts aforestated, the Referee's sale of the mortgaged premises aforesaid, and the purported deed from the Referee to INSPIRATION, are wholly null and void, and should be cancelled of record, on the ground that the defendants failed to comply with the applicable statutes governing the public sale of mortgaged property under foreclosure.

38. That by reason of the facts aforestated, the plaintiffs have been wrongfully deprived of their properties and have sustained great economic and financial losses thereby.

FOR A SECOND CAUSE OF ACTION

39. Plaintiffs repeat and re-allege all of the allegations contained in paragraphs 1 to 38 inclusive and incorporate the same by reference herein, with the same force and effect as if fully set forth in detail herein.

40. That by reason of the facts aforesaid, the plaintiffs have been seriously damaged and injured in their person and in their property, and have suffered great and permanent economic loss; that the plaintiffs EDWINA RAGER and EDWARD RAGER have suffered, now suffer, and will continue to suffer for an indefinite period in the future great mental anguish, and severe emotional distress and illness, all to plaintiffs' damage in the sum of Ten Million ($10,000,000.) Dollars for compensatory and punitive damages.

WHEREFORE, plaintiffs demand that the Court adjudge:

A. That the foreclosure proceeding purportedly instituted by INLAND against INSPIRATION in the Supreme Court of the State of New York, County of New York, under Index No. 2166/75 be deemed and declared null and void at its inception on the ground of fraud and deceit and that the said foreclosure proceeding in its entirety, including the purported judgment of foreclosure, rendered October 28, 1975, and the purported Referee's Deed in Foreclosure from Joseph A. Fontanelli, Jr.,

Referee to INLAND CREDIT CORPORATION, dated December 11, 1975, be vacated, cancelled and set aside.

B. That the purported Deed and conveyance from INSPIRATION ENTERPRISES, INC., to ARDISCO FINANCIAL CORPORATION, dated December 6, 1974, be declared null and void on the ground of fraud and deceit and that the said deed, recorded in the Register's Office on December 12, 1974, in Reel 331, page 19, be cancelled of record.

C. That the purported Referee's sale of the mortgaged premises situated at 16 East 65th Street, New York, New York, under Index No. 2166/75, and the purported Referee Deed in Foreclosure granted thereunder by Joseph A. Fontanelli, Jr., Referee, to INLAND CREDIT CORPORATION, as grantee, be adjudged and declared null and void, and vacated and set aside for failure to comply with *Section 231, subd. 3 and Section 1403 Real Property Actions and Proceedings Law,* as aforestated.

D. That, as further or consequential relief claimed by the plaintiffs herein, the defendants ARDISCO FINANCIAL CORPORATION, INLAND CREDIT CORPORATION, and the individual defendants STERN, DANE and GREENSTEIN, be enjoined and restrained, pending the final determination of this action, from selling, assigning or in any way transferring or incumbering said property or any part thereof.

E. That the said defendants, or any person or agent acting in their behalf, be enjoined and restrained, pending the final determination of this action, from commencing or pursuing any dispossess or eviction proceedings against the plaintiffs EDWINA RAGER and EDWARD RAGER.

F. That the plaintiffs have judgment for compensatory and punitive damages against the defendants, and each of them, jointly and severally, in the sum of Ten Million ($10,000,000.) Dollars.

G. That the plaintiffs have such other, further and different relief as to the Court may seem just and proper, together

with counsel fees, costs and disbursements of the two causes of action herein.

AARON NUSSBAUM
Attorney for Plaintiff
16 Court Street
Brooklyn, New York 11241
(212) 237-1717

JOSEPH M. MEEHAN
Co-Counsel for Plaintiffs
50 Broadway
New York, New York 10004
(212) 425-2616

LETTER DATED DECEMBER 4, 1974

HERETOFORE REPRODUCED BEFORE

LETTER DATED NOVEMBER 27, 1974 HERETOFORE REPRODUCED BEFORE

LETTER DATED DECEMBER 11, 1974, HERETOFORE REPRODUCED BEFORE

APPENDIX "L"
ORDER DATED SEPTEMBER 15, 1978

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

INLAND CREDIT CORP.

against

E. RAGER

Present:
Hon. Guy Gilbert Ribaudo
Judge.

The Court has read these voluminous papers together with the memorandum submitted by the parties and after reading the same has come to the conclusion that this motion to dismiss this summary proceeding should be and is granted.

The respondents' arguments have persuaded the court that the petitioners' application to the Supreme Court for a writ of assistance precludes this proceeding. Petition dismissed and the counterclaim is severed pending the appeal.

Dated September 15, 1978

s/G.G.R.
J.C.C.

APPENDIX "M"
MEDICAL REPORT DATED JUNE 7, 1978

NEW YORK UNIVERSITY MEDICAL CENTER

June 7, 1978

To Whom It May Concern:

Re Mrs. Edwina Rager

Mrs. Edwina Rager has been under my care for rehabilitation medicine for the last several months. The present working diagnosis is transient ischemic attacks due to faulty blood circulation affecting the right side of her body. Her family physician, Dr. Wallace, and neurologist, Dr Jerome Block, and I are investigating the etiology of these attacks.

At the present time, she is undergoing extensive medical evaluation procedures and since I feel that these attacks can be preceeded by tension or anxiety, I do not feel that she can participate in any physical or mental strenuous activities for a minimum of four months.

Sincerely yours,
s/A. Georg Fleischer
A. Georg Fleischer, M.D.

AGF:lc

APPENDIX "N"
MEDICAL REPORT DATED MAY 23, 1977

C. PINCKNEY DEAL, JR., M.D.

To whom it may concern:

Re: Edwina Rager

I have examined the above named patient on this date. She gives a history of having had a left-sided cerebral infarction in February, 1977, following an emotional shock after receiving some bad news. She did not consult a physician at that time but she did consult a physiotherapist, and today has gained back probably 75% of the function of the right upper and lower extremities.

Examination today reveals the lady to be hypertensive, and to have the residual weaknesses of a left cerebral infarction: e.g. a partial left facial (VII) and hypoglossal (XII) nerve paresis, and a partial motor paresis of the right arm and leg.

Although this patient is now under therapy it is my feeling, particularly since the initial episode was brought on by an emotional shock, and presumably therefore, by a rise in blood pressure, that she should not undergo a protracted trial at this time.

Ideally, this should be postponed at least until six months after the initial infarction, and/or her blood pressure is under strict control.

Sincerely yours,

s/C. Pinckney Deal
C. Pinckney Deal, M.D.

CPD:mp

APPENDIX "O"
SEVERANCE AND REMAND OF THE SUMMARY PROCEEDING TO THE CIVIL COURT

On June 15, 1978, the Court directed Petitioner to proceed to trial on the "equity" case (Petitioner's Supreme Court Action) without a jury, and *"severed the Civil Court case, which is a jury case."* (Transcript June 15, 1978, p. 42)

> "THE COURT: Yes. My reason for doing that is a very simple one. In an equity case we don'g have a jury and I can take the 15 witnesses. Bring them in and you can bring Mrs. Rager in next week or anytime and she would have her day in court in a short time. *I told you that we will try the jury case when the equity case is finished. You would have all of your rights to a jury."*
>
> * * *
>
> "THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, if you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all."
>
> "Bring your witnesses in. *You will have your right to a jury trial.* We will proceed now with your equity case. *You will either proceed with your equity case or that will be dismissed and the Civil Court case will be sent back.* ***"
>
> "MR. NUSSBAUM: * * * Your Honor, for you to put the Supreme Court action on for trial without a jury first, ahead of the summary proceeding in which the Appellate Division has already determined and found that we are entitled to a jury trial, would in effect nullify the plaintiffs of

> their right to a jury trial because it is possible, your Honor, that since the two actions are identical with the two causes of action in the Supreme Court now before your Honor, they are absolutely identical, the pleadings and the facts and the fraud are identical, should your Honor decide, and I'm not predicting what happened here, should your Honor decide against the plaintiffs, that would be res judicata, and the Appellate Division has already held that that would be res judicata of the summary proceeding and, therefore, we would be completely out of court. We would lose our property. We would have no right of action and all that, and that would deprive us of our day in court and that the Appellate Division has found that we have a right.
>
> "THE COURT: You are not getting a jury trial because the issues are the same. *You are going to have your jury trial on the summary proceeding in the Civil Court.*
>
> MR. NUSSBAUM: *What I have said to your Honor should your Honor determine against the plaintiffs in the non-jury trial, that will be res judicata.*
>
> "THE COURT: *Of course it will.*
>
> MR. NUSSBAUM: *So, therefore, we would no longer have a right to a jury trial in the summary judgment."* (pp. 45-46) (emphasis supplied)

Further, at p. 47:

> MR. NUSSBAUM: Judge, they started the summary proceeding and *we counterclaimed and set up these affirmative defenses and counterclaims in the Civil Court.* That happened first, your Honor.
>
> "THE COURT: *You will have a right—*
>
> MR. NUSSBAUM: *Which we have a right to a jury trial.*
>
> THE COURT: *You will have a jury trial in the Civil Court."* (p. 47) (emphasis supplied)

And again at p. 53 of the transcript of proceedings:

> "* * * I am sending the case back to the Civil Court, the summary judgment. *I should really dismiss that because you told me Mrs. Rager is ill. I will give you a chance to present her. The equity case is dismissed."* (emphasis supplied)

APPENDIX "P"
AFFIDAVIT OF BIJAN KALANTARI

STATE OF NEW YORK)

COUNTY OF NEW YORK)

BIJAN KALANTARI, of full age, being duly sworn upon his oath, deposes and says:

1. I reside at No. 4 East 65th Street, New York, New York.

2. In October, 1975, it was brought to my attention that No. 16 East 65th Street, New York, New York, was being offered for sale by its owners, whom I was informed were Dr. and Mrs. Rager.

3. I am interested in purchasing a house and therefore I inquired concerning this building.

4. On December 5, 1975, at approximately 7:00 A.M., Mrs. Rager telephoned and informed me that the house would be sold at a foreclosure sale that morning. She informed me as to the details of the proposed sale and the location where it was to take place.

5. On December 5, 1975, I went to the rotunda of the Supreme Court of the State of New York, in Manhattan, New York City, New York, at approximately 10:10 A.M. and waited for the sale to be announced at 10:30 A.M. Hearing no announcement, I waited for some time, and being unable to locate the foreclosure sale for this property, I departed.

6. On December 5, 1975, I was seriously considering bidding for the property and I was prepared to make the necessary cash deposit.

Sworn to
April 17th, 1976

s/Bijan Kalantari
BIJAN KALANTARI

Supreme Court, U. S.
FILED
OCT 26 1979
CLERK

In The

Supreme Court of the United States

October Term, 1979

No. 79-300

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents,

(Continued on Reverse)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MARTIN IRA KLEIN
OLSHAN, GRUNDMAN & FROME
Attorneys for Respondents
505 Park Avenue
New York, New York 10016
(212) 753-7200

RICHARD H. ABELSON
DANIEL BESDIN
Of Counsel

2037 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

INLAND CREDIT CORPORATION,

Respondent,

vs.

EDWINA RAGER,

Petitioner.

Action No. 1

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

vs.

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

Action No. 2

TABLE OF CONTENTS

	Page
Questions Presented	2
Statement of the Case	2
Reasons for Denying the Writ:	
I. The dismissal of petitioner's cause of action, with prejudice, was a proper exercise of the trial court's discretion and did not violate petitioners' right to due process.	12
II. Petitioners' claim of denial of due process of law based on the trial justice's alleged bias and prejudice is groundless.	21
Conclusion	25

TABLE OF CITATIONS

Cases Cited:

Berger v. United States, 255 U.S. 22 (1920) 23

Board of Education v. Pisa, 55 App. Div. 2d 128 (4th Dept. 1976) 22, 23

Boddie v. Connecticut, 401 U.S. 371 (1971) 12, 14, 21

Cataldo v. Burglass, 51 App. Div. 2d 717, 379 N.Y.S. 2d 154 (2nd Dept. 1976), app. dismissed, 39 N.Y. 2d 807 (1977), cert. denied, 429 U.S. 1095 (1977) 15

Centerville Creamery Co., Inc. v. Wexler, 262 App. Div. 1055 (3rd Dept. 1941) 19

Contents

Page

Edmond v. Moore-McCormack Lines, Inc., 253 F.2d 143 (2nd Cir. 1958), cert. denied, 358 U.S. 848 (1958) 16, 20

Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) ... 14

Hooper v. Chrysler Motors Corporation, 325 F.2d 321 (5th Cir. 1964), cert. denied, 377 U.S. 967 (1964) 20

In Ex Parte American Steel Barrel Co., 230 U.S. 35 (1913) . 23

Link v. Wabash Railroad Company, 370 U.S. 626 (1962), rehearing denied, 371 U.S. 873 (1962) 13, 14, 15, 16, 19

Matter of Rotwein, 291 N.Y. 116 (1934) 22

Miller, et al. v. Hainzl, et al., 5 App. Div. 2d 764 (1st Dept. 1958) 18, 19

Milligan v. Hycel Realty Corp., 14 N.Y. 2d 581 (1964) 16

Redac Project 6426, Inc. v. Allstate Insurance Company, 412 F.2d 1043 (2nd Cir. 1969) 16

Securities and Exchange Commission v. Power Resources Corp., 495 F.2d 297 (10th Cir. 1974) 20

Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968), cert. denied, 393 U.S. 1001 (1969) 21, 22

Taub v. Hale, 355 F.2d 201 (2nd Cir. 1966), cert. denied, 384 U.S. 1007 (1966), rehearing denied, 385 U.S. 924 (1966) 15

Contents

Page

United States v. Bennett, 535 F.2d 160 (2nd Cir. 1976), cert. denied, 430 U.S. 906 (1977), rehearing denied, 430 U.S. 976 (1977) 23

United States v. English, 501 F.2d 1254 (7th Cir. 1974), cert. denied, 419 U.S. 1114 (1974) 23

United States v. Grinnell Corp., 384 U.S. 563 (1966) 23

United States v. Haldeman, 559 F.2d 31 (D.C. Cir. 1976), cert. denied, 431 U.S. 933 (1977) 23

Windsor v. McVeigh, 93 U.S. 274 (1876) 12

Witz v. Renner Realty Corp., 47 App. Div. 2d 622, 364 N.Y.S. 2d 529 (1st Dept. 1975), app. dismissed, 429 U.S. 802 (1976) 15

Statutes Cited:

28 U.S.C. §144 23

N.Y. Judiciary Law, §14 (McKinney) 22

New York Civil Practice Law and Rules, §3216(a) (McKinney) 14, 15

New York Civil Practice Law and Rules, Article 78 (McKinney) 17

United States Constitution Cited:

Fifth Amendment 2

Contents

Page

Fourteenth Amendment 2

Rules Cited:

Federal Rules of Civil Procedure, 41(b) 14, 15, 16

APPENDIX

Appendix A — Transcript, January 17, 1977, pp. 8-11 ..... 1a

Appendix B — Transcript, January 18, 1977, p. 48 ..... 3a

Appendix C — Transcript, May 9, 1977, pp. 7-8 ..... 4a

Appendix D — Transcript, May 9, 1977, pp. 4-6 ..... 5a

Appendix E — Transcript, May 9, 1977, p. 18 ..... 7a

Appendix F — Transcript, May 9, 1977, p. 55 ..... 8a

Appendix G — Transcript, June 15, 1977, pp. 2-5 ..... 9a

Appendix H — Transcript, June 12, 1978, p. 4 ..... 12a

Appendix I — Transcript, June 15, 1978, p. 16 ..... 13a

Appendix J — Transcript, June 12, 1978, p. 6 ..... 14a

Appendix K — Transcript, June 12, 1978, p. 8 ..... 15a

Appendix L — Transcript, June 15, 1978, p. 17 ..... 16a

Appendix M — Transcript, June 15, 1978, pp. 16-17 ..... 17a

Contents

Page

Appendix N — Transcript, June 15, 1978, p. 26 ..... 18a

Appendix O — Transcript, June 15, 1978, p. 51 ..... 19a

Appendix P — Transcript, June 12, 1978, pp. 3-6 ..... 20a

In The

Supreme Court of the United States

October Term, 1979

No. 79-300

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners,

vs.

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents,

Action No. 1

INLAND CREDIT CORPORATION,

Respondent,

vs.

EDWINA RAGER,

Petitioner.

Action No. 2

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

vs.

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Did the exercise by a trial judge of his inherent power to dismiss a complaint on the merits for petitioners' failure to proceed to trial when ordered to do so, violate petitioners' right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Did the procedure adopted in this case by the New York courts respecting petitioners' allegations of bias and prejudice on the part of the trial justice violate petitioners' right to due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States?

STATEMENT OF THE CASE

This petition seeks a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Department, where Inspiration Enterprises, Inc. ("Inspiration"), Edward Rager and Edwina Rager (hereinafter collectively referred to as "petitioners") had appealed from a judgment of

the Supreme Court, New York County. That judgment dismissed, on the merits, petitioners' complaint which had sought to vacate a judgment of foreclosure and sale dated October 28th, 1975 (hereinafter the "Inspiration Action"). The basis of the dismissal was petitioners' long history of delay in prosecuting the Inspiration Action and the fact that they refused to go to trial on June 15, 1978, although specifically ordered to do so by the trial court. That judgment was affirmed by the Appellate Division by order dated August 24th, 1979, and on July 10, 1979, the New York Court of Appeals denied petitioners' motion for leave to appeal to that court.

The Inspiration Action involves commercial real property located at 16 East 65th Street, New York, New York ("premises"), consisting of a townhouse containing several apartment dwelling units, which respondent Inland Credit Corporation ("Inland") acquired on December 11, 1975 after judicial sale pursuant to the judgment of foreclosure sought to be vacated by the Inspiration Action. Prior to that foreclosure, the premises had been owned by Inspiration, a corporation of which petitioners Edward Rager, an attorney, and Edwina Rager, his wife, were the principal stockholders, directors and officers. The foreclosure was instituted by reason of Inspiration's failure to pay installments due under Inland's mortgage, under a first mortgage covering the premises, and real estate taxes.[1]

As noted, Inland acquired title to the premises on December 11, 1975. On February 19, 1976, Mrs. Rager, who was then the sole remaining tenant, was served with a notice to quit, and on March 8, 1976, a summary dispossess was commenced in the New York City Civil Court, New York County, to evict her. The next day, Inspiration and the Ragers commenced the Inspiration Action in the Supreme Court, New York County.

On March 15, 1975, petitioners made a motion in the

1. Petitioners had defaulted in the foreclosure action, although given due notice.

Supreme Court to consolidate that summary dispossess proceeding with the Inspiration Action, simultaneously requesting a stay to prevent Inland from proceeding with the dispossess and from disposing of the premises. Before any decision had been made by Mr. Justice Tyler, the Justice to whom the motion had been referred, petitioners made yet another motion to consolidate the Inspiration Action with an action pending in Suffolk County. On May 5, 1976, Mr. Justice Tyler ordered consolidation of the two New York County actions,[2] and *an immediate trial* in view of the fact that the summary dispossess proceeding had now been consolidated with a plenary action.

However, because the court had made no decision respecting the consolidation of the Inspiration Action with the Suffolk action, petitioners had an opportunity to delay that immediate trial. They forthwith brought a motion by order to show cause, to restrain any activity in the Inspiration Action, including trial, until their motion to consolidate the Inspiration Action with the Suffolk action had been decided. On May 27, 1976, the New York County Supreme Court (Baer, J.) denied the motion to consolidate the Inspiration and Suffolk actions. Petitioners, by order to show cause containing a temporary restraining order preventing trial, immediately brought on a motion before Mr. Justice Baer, to reargue and on June 9, 1976, while that motion to reargue was still pending,[3] brought another motion in the Appellate Division, First Department, to stay trial of the Inspiration Action until the appeal from Mr. Justice Baer's May 27th order had been decided, a motion which was not decided until July 29, 1976 when the Appellate Division denied petitioners' motion for a stay. On August 27, 1976 an

2. "Inspiration Action" will hereinafter include the Civil Court summary dispossess unless otherwise noted. The motion to further consolidate the Suffolk Action with the inspiration action was a separate motion and was not pending before Mr. Justice Tyler but before Mr. Justice Harold Baer.

3. That motion was denied on June 17, 1976.

order incorporating Mr. Justice Tyler's decision was noticed for settlement and then entered on September 21, 1976, which by its terms, set the matter down for trial on the equity day calendar in the New York County Supreme Court for September 30, 1976.

But petitioners were not about to go to trial. They requested and received a conference with Mr. Justice Tyler on September 27th, 1976. They asked that he change his order to provide for petitioners' right to disclosure and for a jury. Petitioners were told by Mr. Justice Tyler that he would not change his order and he directed them to apply to the trial judge for leave to take depositions, and for a jury, if appropriate.

The Inspiration Action was then assigned to New York City Civil Court Judge Irving Smith, sitting as a Supeme Court Justice in Trial Term Part 16. Mr. Justice Smith called the case for a pre-trial conference on October 21, 1976, at which time he set the matter down for trial without jury on November 10, 1976. He clearly stated to petitioners that if they objected to proceeding to trial without a jury, their appropriate remedy was a formal motion for a jury, at trial and on the record.

But, these petitioners were absolutely determined that there would never be a trial of the Inspiration Action. On November 1, 1976, they brought a proceeding pursuant to Article 78, New York Civil Practice Law and Rules in the Appellate Division *against Mr. Justice Smith,* seeking an order in the nature of a writ of prohibition, preventing him from conducting a trial of the action without a jury. Although requested by motion upon service of the petition, the Appellate Division refused an interim stay of the trial.

However, petitioners got yet another opportunity to prevent the November 10th trial of the action. On November 9, 1976, just one day before the scheduled trial date, the Appellate Division *affirmed* Mr. Justice Baer's order denying consolidation of the Inspiration and Suffolk actions. On that

same day, petitioners moved in the Appellate Division for a stay of the November 10th trial, pending the hearing and determination of their simultaneous motion for leave to appeal that affirmance to the New York Court of Appeals. Although no interim stay was granted by the court, Mr. Justice Smith, when advised of petitioners' motion in the Appellate Division for a stay, *sua sponte*, adjourned the trial of the matter to November 15, 1976. On November 11, 1976, petitioners made yet another motion in the Appellate Division for a stay of the trial (the first had not been decided), and upon application, Mr. Justice Nunez of the Appellate Division did grant an interim stay of the November 15th trial. Thus, based upon an *affirmance* of Mr. Justice Baer's order denying consolidation of the Inspiration and Suffolk actions, on November 11, 1976, there were two motions for a stay of trial simultaneously pending before the Appellate Division, together with an Article 78 proceeding pending there against Mr. Justice Smith. On November 15, 1976, Mr. Justice Smith was left with no alternative but to adjourn the trial to December 7, 1976, by which time he anticipated that all of the petitioners' machinations to avoid trial would be resolved. However, such was not to be the case.

On November 18, 1976, the Appellate Division dismissed the Article 78 proceeding. Undaunted, on December 2, 1976, petitioners brought yet another Article 78 proceeding against Mr. Justice Smith, now requesting an order in the nature of a writ of mandamus, instead of prohibition. Although no interim stay of the December 7th trial was granted by the Appellate Division, luck again smiled upon petitioners. On that same day, December 2nd, 1976, the Appellate Division granted leave to petitioners to appeal its affirmance of Mr. Justice Baer's order to the New York Court of Appeals, and predictably, on December 6, 1976, one day before the trial was to have started, petitioners moved Judge Fuchsburg of the New York Court of Appeals for an interim stay of that trial, which was granted. Thus, on December 7, 1976, the fourth time the matter had been set down for trial, Mr. Justice Smith was again required to adjourn the

case, which he did to January 5, 1977. However, because he would then no longer be sitting as a Supreme Court Justice, the matter was thereafter assigned to Individual Calendar Part I of the Supreme Court, Mr. Justice Martin Evans presiding. Throughout all of these proceedings, which had then taken nearly a year, Mrs. Rager had remained in possession of the premises without payment of one penny of rent to Inland, or of mortgage installments or real property taxes both of which were being paid by Inland.

On December 16, 1976, the Court of Appeals, *sua sponte*, dismissed the appeal respecting the consolidation of the Inspiration and Suffolk actions. In order to be absolutely certain that the case would not be tried on January 5th, 1977, or at any time thereafter, the petitioners then did the following things:

(a) On December 28, 1976, brought on an order to show cause in the Court of Appeals for a stay of the trial based upon yet another appeal involving the consolidation. No interim stay was signed.

(b) On the same day, made a motion for leave to appeal to the Court of Appeals from the Appellate Division's denial of the Article 78 proceeding against Mr. Justice Smith, notwithstanding the fact that Mr. Justice Smith was no longer connected with the matter. No interim stay was signed.

(c) On January 4th, 1977, made a motion before Mr. Justice Evans, returnable January 17th, 1977 to vacate the purported order of Mr. Justice Smith striking petitioners' jury demand.

(d) On the same day, served notices to take the depositions of all respondents on various days, commencing January 18, 1977 through January 25, 1977.

On January 5th, 1977, the parties appeared before Mr. Justice Evans who adjourned the matter until January 17th,

1977, and granted to petitioners the right to depose the President of Inland which deposition was taken on January 11, 1977.

On January 17, 1977, the parties again appeared before Mr. Justice Evans. To avoid further delay by petitioners through motions to the Court of Appeals, respondents had consented to a consolidation before Mr. Justice Evans of the Suffolk action. Based upon that consent, Mr. Justice Evans drafted an order providing for that consolidation but petitioners objected to the form of the order as so drafted. Accordingly, Mr. Justice Evans, *sua sponte,* and in the exercise of his discretion, refused to consolidate the Inspiration and Suffolk actions (1a - 2a, January 17, 1977, Appendix A).[4]

The next day, January 18th, 1977, the parties again appeared before the court. The petitioners then requested an examination before trial of respondents Dane and Greenstein which the court granted. On that same day, Mr. Justice Evans denied petitioners' motion to restore their jury demand and set the matter down for trial on January 21, 1977 (3a, January 18, 1977, Appendix B).

On January 20, 1977, the depositions of respondents Dane and Greenstein were taken.

On January 21, 1977, petitioners requested and were granted an adjournment of trial, peremptorily, to May 9th, 1977, with no provision made for payment to Inland by Mrs. Rager for reasonable use and occupation of the premises. On that same day, the petitioners moved Mr. Justice Evans for further depositions of respondents Dane and Greenstein, stating to the court that such depositions were absolutely necessary for the proper preparation of their case. On February 11, 1977, Mr. Justice Evans granted that motion, but those depositions were never taken because they were never again requested by petitioners of respondents.

4. References are to pages of the transcript on the date indicated.

On May 9, 1977, although they had received more than a three months' adjournment and the matter had been marked peremptorily, petitioners' counsel appeared solely to obtain another adjournment of trial. On their application for adjournment, they:

(a) stated that Mr. Justice Evan's decision respecting petitioners' right to a jury trial was presently pending before the Appellate Division. Mr. Justice Evans asked whether or not an application to the Appellate Division for a stay of the trial had been made pending the hearing and determination of that appeal. Appellants told him that no such motion had been made (4a, May 9, 1977, Appendix C).

(b) claimed that Mrs. Rager had suffered a "paralytic stroke" and in substantiation of that claim, submitted a letter from a doctor in which no such statement was made. At the time, Mrs. Rager was in court and appeared physically able to go to trial (5a-6a, May 9, 1977, Appendix D);

(c) produced a long and involved document from Mr. Rager in Canada, which, in substance, requested an adjournment for a period of seven months (7a, May 9, 1977, Appendix E).

Mr. Justice Evans refused to be moved by any of these delaying tactics employed by petitioners, and ordered them to go to trial. Petitioners' counsel then, in desperation, stated to the court that Mrs. Rager would not be in court that afternoon, and accordingly, would not go to trial. At two o'clock that afternoon, the summary dispossess proceeded, with Mrs. Rager's counsel present in court, but not participating, and upon presentation of the proof, Mr. Justice Evans dismissed the complaint and granted a final judgment of possession to the respondents, ordering a warrant of eviction to issue with a ten day stay of execution (8a, May 9, 1977, Appendix F).

On May 12, 1977, three days later, petitioners made a motion in the Appellate Division for a stay of all proceedings in

the Inspiration Action pending the determination of the appeal respecting their right to a jury trial. On May 19, 1977, that motion was granted, and the appeal was decided. The Appellate Division held that Mr. Justice Evans had been absolutely correct in finding that petitioners were not entitled to a jury trial in their action to set aside the judgment of foreclosure and sale and for damages. However, the decision stated that petitioners were, in fact, entitled to a jury in the summary dispossess proceeding and to that extent, modified Mr. Justice Evans' decision and order.

On May 31st, 1977 petitioners made a motion to Mr. Justice Evans, by order to show cause, to set aside and vacate their default of May 9, 1977. On or about June 15, 1977, Mr. Justice Evans granted the motion to open the default and further granted an adjournment to Mrs. Rager of the trial until October 15, 1977, based upon her representations regarding her health, *provided she pay into court, commencing June 20, 1977, and on the 20th of each month thereafter, the sum of $2,000* (9a-11a, June 15, 1977, Appendix G).

Mrs. Rager paid the $2,000 for the months of June, July and August, 1977, and thereafter, in total disregard of the court's order, discontinued making any further payments. In October of 1977, respondents' counsel cont. ed Mr. Justice Evans' law secretary, and was then told that there were more than 400 matters ahead of the Inspiration Action and that it would not be possible to obtain a trial until the Spring of 1978. In December of 1977, respondents, by letter, demanded an immediate trial pursuant to Mr. Justice Evans' order of June, 1977. Again, respondents' attorneys were advised that the case could not be reached for trial until the Spring of 1978.

Because of the difficulty in obtaining a trial, respondents then made a motion for summary judgment in the Inspiration Action.

On June 12, 1978, the parties appeared before Mr. Justice Evans, who then stated that he would not entertain the motion

for summary judgment, but instead would try the case. But, Mrs. Rager, who had now been living rent free (except for the $6,000 paid into court) since December of 1975, was obviously not going to go to trial. Her attorney requested an adjournment again based upon Mrs. Rager's health. Mr. Justice Evans inquired if Mrs. Rager were confined to a hospital or at home (p. 4, June 12, 1978, Appendix H) and was advised that she was fully ambulatory and able to come to court (12a, June 12th, 1978, Appendix H; 13a, June 15, 1978, Appendix I). *Nevertheless, because of her purported health problems, Mr. Justice Evans offered to have her testimony taken by deposition* (14a, June 12, 1978, Appendix J). The offer was ignored. In yet another effort to avoid trial, for the very first time, petitioners then stated that they wished to bring in new trial counsel. That request was denied by the court (15a, June 12, 1978, Appendix K). The court set June 15th, 1978, as the trial date and stated the equity action would be tried first.

On June 15, 1978, counsel for petitioners appeared, solely to apply for an adjournment of the trial until after Labor Day, despite the direction of the court. The grounds for this application were (a) again, Mrs. Rager's health (13a, June 15, 1978, Appendix I); (b) the new trial counsel (who had no standing in the case) had not had an opportunity to adequately prepare for the case, (16a, June 15, 1978, Appendix L); and (c) there had not been full compliance by respondents with the disclosure provisions of the New York Civil Practice Law and Rules (17a, June 15, 1978, Appendix M) although appellants had not even used the disclosure granted to them. The court heard argument on all grounds for an adjournment and denied the application, noting that the matter had been on the calendar for more than a year and had been noticed and called for trial on numerous occasions, and further noting that all depositions had been taken in January, 1977, and no application of any kind had been made to the court for any relief respecting disclosure (18a, June 15, 1978, Appendix N). When petitioners refused to proceed, the court severed the summary dispossess

proceeding, and dismissed the complaint in the Inspiration Action on the merits and with prejudice (19a, June 15, 1978, Appendix O). Judgment was entered on July 17, 1978. That judgment was affirmed by the Appellate Division without opinion by order dated April 24, 1979 (Pet. Appendix C). On July 10th, the New York Court of Appeals denied petitioners' motion for leave to appeal (Pet. Appendix E).

REASONS FOR DENYING THE WRIT

I.

The dismissal of petitioner's cause of action, with prejudice, was a proper exercise of the trial court's discretion and did not violate petitioners' right to due process.

All that due process requires is that a party be given a meaningful *opportunity* to be heard after having received adequate notice. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971). Thus, it has long been recognized that a court may, upon a party's deliberate failure to prosecute, dismiss a cause of action with prejudice. Such inherent power in a court is necessary to the orderly and efficient adjudication of cases before it. As long ago as 1876, in *Windsor v. McVeigh,* 93 U.S. 274, 278 (1876) this Court stated as follows:

> "The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases. And if the appearance be not made, *and the right to be heard be not exercised,* within the period thus prescribed, the default of the party prosecuted, or possible claimants of the property, may, of course, be entered . . ." (Emphasis added.)

In *Link v. Wabash Railroad Company,* 370 U.S. 626 (1962), *rehearing denied,* 371 U.S. 873 (1962) the Court stated:

> "The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts. . . . It has been expressly recognized in Federal Rules of Civil Procedure 41(b), which provides, in pertinent part:
>
> '(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.'
>
> * * *
>
> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an 'inherent power', governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases. That it has long gone unquestioned is apparent not only from the many state court decisions sustaining such dismissals, but even

> from language in this Court's opinion in *Redfield v. Ystalyfere Iron Co.*, 110 U.S. 174, 176, 3 S. Ct. 570, 28 L. Ed. 109. It also has the sanction of wide usage among the District Courts." *Id.* at 629-631.

As the Court explained in *Hammond Packing Co. v. Arkansas,* 212 U.S. 322, 351 (1909), the authority of a court to dismiss a cause of action which is negligently prosecuted (and, *a fortiori,* deliberately not prosecuted), is based upon a presumption that the party, by refusing to prosecute his case, admits its invalidity. It is thus clear that under such circumstances, the party whose cause of action is dismissed cannot claim the deprivation of his right to due process of law. As noted, the constitutional guarantee of due process grants to plaintiff a meaningful opportunity to be heard. However, it in no way entitles him to a full hearing regardless of how negligently or unreasonably he delays in pressing his complaint. *Boddie v. Connecticut,* 401 U.S. 371, 377 (1971).

Rule 41(b) of the Federal Rules of Civil Procedure, as pointed out by the Court in *Link v. Wabash Railroad Company, supra,* gives statutory expression to the Court's long recognized inherent power to dismiss an action on its merits under appropriate circumstances. This Court has considered Rule 41(b) on many occasions and, while emphasizing the need to be circumspect in its use, has never denied its essential validity under the due process clause.

Section 3216(a) of the New York Civil Practice Law and Rules (McKinney), the New York State counterpart of Rule 41(b), provides as follows:

> "(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosection thereof against any party who may be liable to a separate judgment, or

> unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits."

In view of the fact that this Court has recognized the right to dismiss on the merits as an inherent power of courts and that it has upheld the validity of Rule 41(b), clearly CPLR 3216(a), again, a statutory expression of a court's inherent powers, does not violate the due process clause of the Constitution, a conclusion supported by the fact that, when requested, this Court has consistently refused to review the validity of CPLR 3216. *Cataldo v. Burglass,* 51 App. Div. 2d 717, 379 N.Y.S. 2d 154 (2nd Dept. 1976), *app. dismissed,* 39 N.Y. 2d 807 (1977), *cert. denied,* 429 U.S. 1095 (1977); *Witz v. Renner Realty Corp.,* 47 App. Div. 2d 622, 364 N.Y.S. 2d 529 (1st Dept. 1975), *app. dismissed,* 429 U.S. 802 (1976).

Thus, the only question now before this Court is whether the record here demonstrates that the trial court so abused its discretion in finding petitioners to have been unreasonably and indeed, deliberately, neglectful in prosecuting their case, that petitioners' constitutional rights have been violated. As the Court stated in *Link v. Wabash Railroad Company, supra,* in connection with the trial court's order of dismissal under Rule 41(b):

> "Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the court's discretion." 37 U.S. at 633.

See Taub v. Hale, 355 F.2d 201, 202 (2nd Cir. 1966), *cert. denied,* 384 U.S. 1007 (1966), *rehearing denied,* 385 U.S. 924 (1966) (applying Rule 41(b)), (". . . such dismissal is largely a

matter of the judge's discretion."); *Edmond v. Moore-McCormack Lines, Inc.*, 253 F.2d 143, 144 (2nd Cir. 1958), *cert. denied*, 358 U.S. 848 (1958), ("Whether the failure to prosecute was such as to warrant an involuntary dismissal under F.R.C.P. Rule 41(b) . . . was a question lying within the discretion of the court."); *Redac Project 6426, Inc. v. Allstate Insurance Company*, 412 F.2d 1043, 1046 (2nd Cir. 1969), ("It is well settled that neither a dismissal with prejudice for failure to prosecute nor a refusal to vacate such a judgment will be reversed on appeal except for abuse of discretion." *Citing Link v. Wabash Railroad Company, supra*); *Milligan v. Hycel Realty Corp.*, 14 N.Y. 2d 581 (1964), (appeal of dismissal order dismissed on grounds that appeal involved a pure question of discretion not reviewable by the Court of Appeals).

In the instant case, the record in the trial court below demonstrates, beyond argument, that the trial justice did not abuse his wide discretion by requiring petitioners to either proceed to trial on June 15th, 1978, or have their complaint dismissed with prejudice. On that day, the court stated, reminding petitioners that they had once before defaulted upon the trial of the action:

> ". . . I reopened it and gave you a chance and told you what were the reasonable conditions, the reasonable conditions which apparently have not been fulfilled *and the delay in the case is solely the fault of your clients.*" (p. 53, June 15, 1978). (Emphasis added.)

The lengths to which petitioners went in this matter to avoid a trial almost defies belief. The case was on the calendar *for trial* on at least seven separate occasions starting in September 1976 and ending June 15, 1978. Each time the matter was to be called for trial, the petitioners either took dilatory action shortly before the trial date to prevent that trial, including the bringing of two proceedings against the trial justice under

Article 78 of the New York Civil Practice Law and Rules, or actually appeared on the call of the calendar but always solely for the purpose of obtaining an adjournment. They were never ready for trial and never intended to be ready for or actually go to trial.

On May 9, 1977, the petitioners, for the first time, sought an adjournment based upon Edwina Rager's purported ill health. On June 15, 1977, after opening the petitioners' default of May 9th, the trial justice agreed to adjourn the trial for a period of more than four months because of Mrs. Rager's purported physical condition, requiring her, as a condition of that adjournment, to pay into the trial court (not to respondents) certain sums for the use and occupation of the premises. Mrs. Rager flagrantly disregarded the court order, but nevertheless, still received not four, *but twelve months' adjournment of the trial*, a time period more than adequate for her recovery by her own doctor's statements.[5] Yet on June 15th, 1978, one year later, Mrs. Rager's attorney appeared, solely for the purpose of again obtaining an adjournment, based upon Mrs. Rager's purported ill health. As in each instance before, when adjournments had been requested based upon Mrs. Rager's ill health, she was not hospitalized or confined to her home. She was fully ambulatory and able to come to court. In spite of those facts, on June 15, 1978, the court offered to have her testimony taken by oral deposition. Moreover, when an extended adjournment had been granted in June 1977, Mrs. Rager totally failed to abide by the conditions for that adjournment imposed by the court. It is hard to conceive of a situation where a trial justice acted more reasonably than in the instant matter, particularly where, as here, it was so patently obvious that petitioners' sole purpose was to avoid trial at any

5. In May 1979, Mrs. Rager had submitted a letter from a doctor stating that she had suffered a "cerebral infarction" and should not be permitted to go to trial for at least six months. In June 1978, more than a year later, she submitted a letter from a doctor on the same grounds stating she should not go to trial for another four months (20a-22a, June 12, 1978, App. P).

cost. Mr. Justice Evans was aware of the fact that Mrs. Rager was living at the premises, without payment of rent, of real property taxes or of the amounts due under the first and second mortgages covering the premises. Yet he granted to her adjournments totalling nearly one and one half years based upon the flimsiest of excuses. Petitioners' counsel came to court on June 15, 1978, fully aware that the matter was to be tried, but were still not ready to go to trial, hoping to get yet another adjournment. Thus, petitioners' contentions that Mr. Justice Evans failed to grant to them a reasonable adjournment and that their rights to due process have been violated are ludicrous.

Moreover, petitioners' contentions find no basis in New York law. A case directly on point is *Miller, et al. v. Hainzl, et al.*, 5 App. Div. 2d 764 (1st Dept. 1958), in which the court, in reversing the lower court's order opening plaintiff's default, stated as follows:

> "On that date [the trial date], counsel for plaintiff applied for an adjournment [from February 8, 1957] to April, 1957 on the ground that plaintiff's father . . . had suffered two heart attacks since December, 1956 and it was essential that plaintiff's mother, who was to be a witness, accompany the father to Florida for his health. The Justice presiding . . . while refusing to grant the delay, obtained an agreement from counsel to take the mother's deposition before her departure to Florida. Accordingly, the trial was adjourned to February 14. On the latter date, plaintiff's attorney again requested an adjournment because the mother had departed for Florida, her deposition had not been taken, it was averred because the father's physician advised that the father's condition would be adversely affected by the mother's participation in the lawsuit. Upon counsel's rejection of the Court's proffer of an

adjournment for two or three more days, defendant's motion to dismiss was granted. Four months later in June, 1957, plaintiff moved to restore the case to the calendar. The order granting that motion is subject to this appeal. *While a court has discretionary power to open defaults in the furtherance of justice, that discretion is not properly exercised in a case where a default is deliberate. The facts demonstrate that the plaintiff took the calculated risk of dismissal after every reasonable opportunity was given to him to proceed with the trial.* We are not satisfied that the deposition of the mother could not have been taken, with all due regard to the health of the father before the witness left the jurisdiction. In the circumstances of this case, the Court should not have exercised its discretion to open the default." (Emphasis added.) *Id.* at 764-765.

The documented activities of petitioners in this matter demonstrate that their sole purpose throughout the entire case was to prevent the trial of this action. Many adjournments were granted to petitioners over much larger periods of time than those in the *Miller* case, *supra.* In fact, as in the *Miller* case, when the trial court was advised of Mrs. Rager's ill health, it offered to accept her testimony by deposition (4a, June 12, 1978, Appendix C).

Petitioners had many meaningful opportunities to try their case. Their request for an adjournment and refusal to proceed to trial on June 15, 1978, on the grounds stated to the trial justice, did not constitute a legal excuse, in the absence of which the trial court's dismissal was just and proper. *Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Centerville Creamery Co., Inc. v. Wexler*, 262 App. Div. 1055 (3rd Dept. 1941).

As the Court of Appeals for the 10th Circuit has stated, "[T]here is no precise rule as to what circumstances justify a dismissal for failure to prosecute. Instead, the procedural history of each case must be examined to make such a determination." *Securities and Exchange Commission v. Power Resources Corp.*, 495 F.2d 297, 298 (10th Cir. 1974). Certainly the record in this case lends abundant support to Mr. Justice Evans' determination, as affirmed by the Appellate Division, that petitioners' request for adjournment was merely another in a three year-long series of dilatory tactics. In light of the fact that petitioner Edwina Rager had consistently appeared in court and seemed fully ambulatory, that she had been previously given a twelve month adjournment which, by her own Doctor's statements was more than adequate for her recovery, that she refused the trial justice's offer to have her testimony taken at her home, and that whatever medical opinions she offered to the court on June 15th were merely in the form of letters, Mr. Justice Evans certainly did not deprive petitioners of due process of law by dismissing their complaint on the merits. "In the situation presented, the judge in ordering the dismissal might reasonably have concluded that the plaintiff's default of appearance was not caused by illness but was an unduly belated maneuver to obtain yet another postponement." *Edmond v. Moore*, 253 F.2d at 144, *supra; Hooper v. Chrysler Motors Corporation*, 325 F.2d 321 (5th Cir. 1964), *cert. denied*, 377 U.S. 967 (1964). There is clearly no basis presented here for granting the writ based upon a purported violation of petitioners' right to due process of law.

II.

Petitioners' claim of denial of due process of law based on the trial justice's alleged bias and prejudice is groundless.

As noted in Point I of this brief, all that is required to satisfy procedural due process is the giving of proper and adequate notice and a meaningful opportunity to be heard. *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). In *Stump v. Bennett*, 398 F.2d 111 (8th Cir. 1968), *cert. denied*, 393 U.S. 1001 (1969), the court explained the role of the federal judiciary in enforcing, as to the States, the due process clause of the Constitution:

> "The due process clause permits a State a wide birth in developing rules of procedure and evidence . . . a constitutional violation cannot rest upon our independent judgment or personal appraisal of what seems the fairer or the better procedure . . . the fundamental bases of 'due process' relates to adequate notice and reasonable opportunity to be heard . . . beyond these minimal standards only oppressive and arbitrary state procedural rules command federal review. Federal intervention is justified only when the State law 'offends some principal of justice so noted in the traditions and conscience of our people as to be ranked as fundamental', *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105, 54 S. Ct. 330, 78 L. Ed. 674 (1934) or frustrates a right 'implicit in the concept of ordered liberty'. *Palco v. State of Connecticut*, 320 U.S. 319, 329, 58 S. Ct. 149, 82 L. Ed. 288 (1937). (Except as noted, citations omitted.)" 398 F.2d at pp. 113-114.

Accordingly, the only question presented to this Court by the petition in the instant case is whether or not the procedures

adopted by the New York Legislature and courts with respect to an alleged bias or prejudice of a trial justice violate the traditional notions of due process. It is respectfully submitted that they do not. New York Judiciary Law, §14 (McKinney) limits the sole grounds upon which a judge must be *disqualified* to those cases in which:

> "He is a party, or in which he has been attorney or counsel, or in which he is interested, or . . . he is related by consanguinity or affinity to any party to the controversy within the sixth degree."

It is therefore clear that Mr. Justice Evans was not required to disqualify himself in the case at bar because no charge within the purview of §14 was made against him at any time. Under New York case law, a judgment rendered by a "biased" or "prejudiced" judge — as opposed to one who is personally interested in the outcome of the case — will, nevertheless, be sustained unless it is demonstrated that such judgment was brought about by the bias or prejudice and therefore was not based upon the facts of the case. *Matter of Rotwein,* 291 N.Y. 116 (1934); *Board of Education v. Pisa,* 55 App. Div. 2d 128 (4th Dept. 1976). These rules are well within the limits prescribed by the due process clause because they do not alter the basic concept that a litigant is entitled to a meaningful, fair opportunity to be heard. If a judge comes within the purview of New York Judiciary Law, §14, he is automatically disqualified and may not sit on the case. Any judgment rendered by such a judge would be invalid. On the other hand, if he is "biased" or "prejudiced" against a defendant, his judgment may still be fair and impartial, if it is rendered solely on the facts of the case. *See Stump v. Bennett,* 398 F.2d 111 (8th Cir. 1968). In the case at bar, there is no indication of any kind that Mr. Justice Evans dismissed petitioners' complaint for any reason other than the fact that they refused to go to trial on June 15, 1978, although the matter had been adjourned many times before.

Moreover, the petitioners have totally failed to show any bias or prejudice whatsoever on the part of Mr. Justice Evans. They have done no more than point to a series of adverse rulings made by the trial justice during the course of the litigation. As a matter of law, adverse rulings do not demonstrate bias or prejudice. 28 U.S.C. §144; *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966); *Berger v. United States,* 255 U.S. 22, 31 (1920). In *United States v. Grinnell Corp.,* 384 U.S. 563, 583 (1966), this Court stated as follows:

> "The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."

In *Berger v. United States,* 225 U.S. 22, 31 (1920) this Court, referring to *In Ex Parte American Steel Barrel Co.,* 230 U.S. at p. 35 (1913), stated as follows:

> "This case establishes that the *bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case."* (Emphasis added.)

United States v. Haldeman, 559 F. 2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977); *United States v. Bennett,* 535 F. 2d 160 (2nd Cir. 1976), *cert. denied,* 430 U.S. 906 (1977), *rehearing denied,* 430 U.S. 976 (1977); *United States v. English,* 501 F. 2d 1254 (7th Cir. 1974), *cert. denied,* 419 U.S. 1114 (1974); *see Board of Education v. Pisa,* 55 App. Div. 2d 128, 136 (4th Dept. 1976).

As noted, petitioners have failed to state a single instance in which the trial justice evidenced any prejudice or bias whatsoever, except to point to his adverse rulings. While these rulings, carefully enumerated in petitioners' brief, effectively

illustrate the weakness of petitioners' case in the trial court, under both New York and federal law, they cannot serve as grounds for a finding of bias on the part of the trial justice. In desperation, petitioners call this Court's attention to a telegram sent to Mr. Justice Evans by Mr. Rager on January 5, 1977, as a so-called "extra judicial" source of the trial justice's so-called bias. But by petitioners' own admission, that telegram was "rambling" and "disjointed" (Petitioners' Brief, pp. 21, 47). Given the circumstances of its authorship and its contents and the fact that petitioners' brief does not even state that the trial justice read that telegram, it is incredible that they would claim that such trivia could or would impair Mr. Justice Evans' ability to render a fair and impartial judgment. Petitioners concede that they did not deem it necessary to move for Mr. Justice Evans' disqualification upon his receipt of Mr. Rager's telegram (Petitioners' Brief, p. 21). It was only after Mr. Justice Evans handed down the series of adverse rulings that petitioners suddenly claimed bias on his part because of the telegram. However, such sophistry does not alter the fact that these petitioners are claiming bias based on rulings of the court adverse to them, all reviewable on appeal.

It is respectfully submitted that, as a matter of law, petitioners have totally failed under either state or federal law to show a bias or prejudice on the part of the trial justice in this case which effectively deprived them of due process of law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARTIN IRA KLEIN
Olshan, Grundman & Frome
Attorneys for Respondents

RICHARD H. ABELSON
DANIEL BESDIN
Of Counsel

APPENDIX A — TRANSCRIPT, JANUARY 17, 1977, pp. 8-11

* * *

THE COURT: In other words, I take it that you are not requesting me at this time to consolidate number three with action —

MR. NUSSBAUM: I am not requesting at this time for the specific reason that having seen the proposed order that I definitely do not want to have any order of consolidation entered into in this [9] case in the form in which Your Honor has prepared it.

I may say to Your Honor for the record this; when Number One Action and Action Two were consolidated on consent of the defendant, they stipulated that the title of the action shall be exactly as the plaintiff's complaint is. Namely, Inspiration Enterprises vs. Inland Credit Corporation, etc. Now all of a sudden when this final action came in the whole procedure is turned around.

We are the defendant. We don't have the right to open, and close last and it places us with a distinct disadvantage before the Court.

We had started this action before they filed. I filed the complaint in the Supreme Court, Your Honor, on a lis pendens filed in this court before they served their petition to dispossess us. Why are we deprived of our right to open and close before the jury? That is the purport of Your Honor's proposed order. I definitely will not consent to [10] that. It will deprive the plaintiffs of their right to a fundamental right to a fair trial of the issues in this action.

THE COURT: It seems to me, Mr. Nussbaum, I had been

advised that the summary proceeding had been first commenced and then you brought an action.

MR. NUSSBAUM: No, sir. The record will show that I filed a complaint in the lis pendens before the Supreme Court before the service of the summary proceeding.

THE COURT: Which action?

MR. ABELSON: May I say this, Your Honor. First of all I really can't answer the question because we were not the attorneys at the time all their proceedings came up, and I don't have the date.

Secondly, Mr. Nussbaum continuously talks of "I think that matter is still pending before Your Honor" and I don't know that there will be a jury here.

[11] THE COURT: Since it's not a jury trial, the plaintiffs still have the right to open and close.

MR. ABELSON: I will give him the right to open and close right now. Just as I consented to the consolidation he may have the right to open and close.

MR. NUSSBAUM: Three months ago he consented to consolidation yet he burdened this court and the Court of Appeals by withdrawing that consent.

THE COURT: There are two matters before me; Numbers One and Two. They have been consolidated. Those are the only matters before me at this time.

Mr. Nussbaum said that he does not want me to consolidate the Suffolk County action. The other motion will be decided by tomorrow. I will therefore set this matter down for tomorrow morning for a further proceeding, possibly for trial.

* * *

APPENDIX B — TRANSCRIPT, JANUARY 18, 1977, p. 48

THE COURT: The case is set down for the 21st of January for trial.

MR. ABELSON: Thank you, Your Honor.

* * *

CERTIFIED TO BE A TRUE AND CORRECT TRANSCRIPT OF THIS PROCEEDING

s/ Acquilla M. Davis
ACQUILLA M. DAVIS, CSR
Official Court Reporter

APPENDIX C — TRANSCRIPT, MAY 9, 1977, pp. 7-8

* * *

And lastly, with respect to the appeal before the Appellate Division, the Appellate Division has not seen fit to grant the stay and no application, to my knowledge, has recently been made for a stay.

THE COURT: Has any application been made for a stay?

[8] MR. MEEHAN: No, sir.

MR. NUSSBAUM: No, Your Honor.

* * *

APPENDIX D — TRANSCRIPT, MAY 9, 1977, pp. 4-6

MR. MEEHAN: * * *

With respect to the health of Mrs. Rager, I have a copy of an affidavit of Dr. Robert Wallis, M.D., and I have copies for Your Honor. Let the record indicate that I provided Mr. Abelson with a copy.

Mrs. Rager is in court and she is prepared to submit to any questions that Your Honor may have; and also, if Your Honor sees fit, she is prepared to undergo any medical examination you may deem advisable.

THE COURT: Mark this for identification.

(Document received and marked for identification as Plaintiff's Exhibit 1.)

MR. MEEHAN: As I understand it, Your Honor, the essence of this affidavit is to the effect [5] that Mrs. Rager has suffered a mild paralytic stroke.

THE COURT: It looks more like low back pain to me.

MR. MEEHAN: I beg your pardon?

THE COURT: It looks like low back pain to me.

MR. MEEHAN: I am not a qualified medical man, this is what she complains to me of and this is what she reports in the affidavit.

THE COURT: Is she in court today?

MR. MEEHAN: She is; and the record indicates on the basis of the affidavit here, she cannot sit for a long period of

Appendix D

time and she is in a position where she is essentially incapacitated; and on that basis, on the basis of the jury question, which is to be submitted, the expense or possible expense involved in having to re-litigate this case in the event of reversal by the Appellate Division, and in view of the transcripts which is the least serious basis for the application at this particular [6] time, I respectfully request and renew my application for an adjournment of this matter until such time as the Court may deem fit under these circumstances.

* * *

APPENDIX E — TRANSCRIPT, MAY 9, 1977, p. 18

MR. NUSSBAUM: * * *

I have appeared for him and I still technically and officially appear for him as counsel because I have not been officially relieved as counsel. It appears from the communications from Mr. Rager to the Court and to me and Mr. Meehan that he regards himself as representing himself. He does not regard us as representing him but nevertheless, as attorneys of record in this matter, not having been relieved, Your Honor, I think it is my duty, Your Honor, both to Mr. Rager and to the Court and to my function as an attorney, Your Honor, to present to Your Honor this statement entitled "Application to Place Case on General Calendar for An Adjournment for at Least Seven Months" on behalf of Mr. Rager. I have not read the statement, Your Honor; I have had no opportunity to read it, it was presented to me this morning but in view of the circumstances that I have stated here for the record, I now ask Your Honor to receive this.

APPENDIX F — TRANSCRIPT, MAY 9, 1977, p. 55

THE COURT: * * *

The Court hereby grants the motion of the Petitioner, Inland Credit Corporation and orders the issuance of a final judgment and orders that a warrant issue.

The respondent, Edwina Rager, may have ten day's stay.

MR. ABELSON: Thank you, Your Honor.

* * *

APPENDIX G — TRANSCRIPT, JUNE 15, 1977, pp. 2-5

THE COURT: Now gentlemen, I'm going to order this case since it is a summary proceeding in substance be tried expeditiously. Therefore, I will grant the adjournment provided that the Rager or Inspiration Enterprises or Edward Rager or anyone else pay into the court the sum of $3,623 per month. That's to commence on Monday morning on June 20th, if you want the adjournment of this case. If that is paid and the payments are made every month, on the 20th of the month to the Clerk of the court in that amount, then I will adjourn the case until as you requested Mr. Nussbaum to October 15th.

MR. MEAHAN: I requested it. I take it that's over the objection of counsel for the Inland Credit Corporation; $3,623 payable to the Clerk of the court.

THE COURT: On Monday, June 20th.

MR. MEAHAN: And each successive day of the month?

THE COURT: If that is done on Monday June 20th, the case will be adjourned to October 15th, with the right, however, of Inland Credit Corporation [3] to move for an earlier trial in the event the monies are not paid in on a monthly basis.

On the other hand, if that is done, then while some prejudice is to Inland Credit, but not much. If that is done as I told you earlier today, the case will be tried in October. Both cases will be tried. I will allow you to try the jury case in summary proceeding first. If, on the other hand, the money is not put in the adjournment is not granted. The case will go to trial on Monday June 20th. You still can go ahead with the jury if you wish. We will try the jury issue first. If, on the other hand, you are unable to proceed with the jury issue because you say that Mrs. Rager was unable to be here; she may be your chief

witness. You told me you have some fifteen or so other witnesses is that right, Mr. Nussbaum?

MR. NUSSBAUM: Yes.

THE COURT: We will then proceed with the non-jury issue. I think its called action number one, and take that before the Court and I will give you time to have your witnesses in or out because the [4] court trial, we are a little more flexable.

If Mrs. Rager cannot come to court with her testimony the Court will be prepared to go wherever she is, in bed, home or hospital and take the testimony there. That's an inconvenience to the Court but I think it would be fair to the parties. I will let you make that determination. The jury trial if she is prepared to go ahead and non-jury if she doesn't want to come to court and adjournment on a monthly basis, month by month up to October 15th so long as she or some money is put up and paid to the Clerk of the court. I granted your motion in that manner.

MR. MEAHAN: To the extent your Honor did not grant our motion as I indicated this morning. An exception was taken. I respectfully —

THE COURT: In what respect?

MR. MEAHAN: Number one, the bearer and reasonable occupancy involved. Number two, with respect to this afternoon, the numbers that were put forth by your Honor and considerations that I urged in your Honor considering a different treatment [5] of the equities in this particular situation.

THE COURT: That's the order of the Court, gentlemen.

MR. MEAHAN: Also the physical conditions.

MR. ABELSON: I am most anxious that this case go to trial. I am most anxious that there be no hitches such as there has been in the past. I am prepared with the permission of the Court who I think has made a perfectly sound decision here none the less, to waive the interest on the second mortgage of the $1,650 and I am willing to accept $2,000 for the adjournment.

THE COURT: Put up $2,000.

MR. ABELSON: $2,000; which is for the first mortgage and the taxes.

THE COURT: The order will be amended to provide for that. $2,000 payable on Monday June 20th, and every 20th of each month thereafter.

MR. ABELSON: I don't know how I can be more reasonable.

_____

J.S.C.

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

s/ Thomas Michiarico

APPENDIX H — TRANSCRIPT, JUNE 12, 1978, p. 4

* * *

THE COURT: Is she confined to the hospital or the home?

MR. NUSSBAUM: No, your Honor, but I am informed that she has suffered a recurring paralysis of the condition, if your Honor please, that was made to the Court in a certificate which I respectfully request permission to read into the record.

* * *

APPENDIX I — TRANSCRIPT, JUNE 15, 1978, p. 16

THE COURT: You told me yesterday that she couldn't get around because she was incapacitated.

MR. NUSSBAUM: I didn't say that. She was not hospitalized. She was not bedridden. I said to go to trial in this case, your Honor, would subject her to serious emotional injury which would worsen the paralytic condition which she is suffering from and she is now undergoing treatment. As a matter of fact, today she told me that she arranged for treatment and observation. She is ambulatory, your Honor. I never said otherwise. I never indicated otherwise.

* * *

APPENDIX J — TRANSCRIPT, JUNE 12, 1978, p. 6

* * *

THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, if you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all.

MR. NUSSBAUM: Your Honor, may I consult with her before your Honor puts this down?

THE COURT: No. We have a specific date.

* * *

APPENDIX K — TRANSCRIPT, JUNE 12, 1978, p. 8

* * *

THE COURT: You are a very good trial lawyer, Mr. Nussbaum.

MR. NUSSBAUM: Your Honor, I have had no experience. The woman's life depends on this case, your Honor. This is a matter of life and death to these people.

THE COURT: I am setting it down, gentlemen, for June 19, ten o'clock, to proceed with all the witnesses you have. If you need a little more time for Mrs. Rager's testimony, I may grant it then or you can take her testimony by deposition. If you have any other witnesses you can proceed with them. Gentleman, ten o'clock Monday morning for trial.

* * *

APPENDIX L – TRANSCRIPT, JUNE 15, 1978, p. 17

* * *

THE COURT: I will hear Mr. Schleimer.

MR. SCHLEIMER: My problem, sir, in trying this case is one of literal and physical impossibility before Labor Day and I want to commit to you, sir, as an officer of the court, that it is not a stall. My particular problem in point of time is simply this. I started last night, one, a Petition on Bond in the Third Circuit Court of Appeals —

THE COURT: I understand you are busy, but I don't want the details.

* * *

APPENDIX M — TRANSCRIPT, JUNE 15, 1978, pp. 16-17

* * *

MR. SCHLEIMER: Mr. Nussbaum advised me yesterday after I was retained that he has as yet not received the return of the examinations before trial which he has been trying to get since January of 1977, together with insertions of information that was not available at the depositions and by agreement were to be inserted, added to the examinations and returned. I understand —

MR. ABELSON: First of all, your Honor, I [17] have returned two signed depositions this morning. I will stipulate to supply whatever information is necessary that the Court feels is relevant. Mr. Greenstein is coming in on the third deposition this morning. Although how necessary that is, I don't know.

I would like to make a statement to this Court that —

* * *

APPENDIX N — TRANSCRIPT, JUNE 15, 1978, p. 26

* * *

THE COURT: When were the EBTs taken?

MR. NUSSBAUM: On January 10, 1977. In that connection, your Honor —

THE COURT: Excuse me. January 10, 1977. Have you made any application to the court to get the answers to the 13 unanswered questions?

MR. NUSSBAUM: Your Honor, I sent this letter to Mr. Abelson demanding the return —

THE COURT: Have you made any application to the court?

MR. NUSSBAUM: No, because on May 9, 1977, this matter appeared before your Honor. Your

APPENDIX O — TRANSCRIPT, JUNE 15, 1978, p. 51

* * *

THE COURT: I am granting the motion to dismiss the equity case on the merits and I am going to sever the Civil Court proceeding and send it back to the Civil Court for trial.

MR. NUSSBAUM: Did your Honor say on the merits?

THE COURT: On the merits.

MR. NUSSBAUM: Without a trial?

THE COURT: I have given you opportunities of trial and you are not ready. I said on the merits.

* * *

APPENDIX P — TRANSCRIPT, JUNE 12, 1978, pp. 3-6

* * *

MR. NUSSBAUM: Thank you, your Honor.

May it please the Court. I have received on Friday a copy of a medical certificate signed by Dr. A. Georg Fleischer of the New York University Medical Center, Institute of Rehabilitation Medicine, Dr. Rusk's institute, of 400 East 34th Street, New York, dated June 7, 1978. May I read this into the record, your Honor?

THE COURT: Yes.

MR. NUSSBAUM: "To Whom it May Concern: Re: Mrs. Edwina Rager. Mrs. Edwina Rager has been under my care for rehabilitation medicine for the last several months. The present working diagnosis is transient ischemic attacks due to faulty blood circulation affecting the right side of her body. Her family physician, Dr. Wallace, and neurologist Dr. Jerome Block, and I are investigating the etiology of these attacks.

[4] At the present time, she is undergoing extensive medical evaluation procedures and since I feel that these attacks can be preceded by tension or anxiety, I do not feel that she can participate in any physical or mental strenuous activities for a minimum of four months. Sincerely yours, A. Georg Fleischer, M.D."

THE COURT: Is she confined to the hospital or the home?

MR. NUSSBAUM: No, your Honor, but I am informed that she has suffered a recurring paralysis of the condition, if your Honor please, that was made to the Court in a certificate which I respectfully request permission to read into the record.

THE COURT: Prior to this?

MR. NUSSBAUM: Prior to this, your Honor. On May 23, 1977, Dr. C. Pinckney Deal, Jr., 660 Park Avenue, New York, N.Y. May 23, 1977. "To Whom it May Concern: Re: Edwina Rager. I have examined the above patient on this date. She gives a history of having had a left sided [5] cerebral infarction in February, 1977, following an emotional shock after receiving some bad news. She did not consult a physician at that time, but she did consult a physiotherapist, and today has gained back probably 75 per cent of the function of the right upper and lower extremities.

Examination today reveals the lady to be hypertensive, and to have the residual weaknesses of a left cerebral infarction: e.g. a partial left facial (VII) and hypoglossal (XII), nerve paresis and a partial motor paresis of the right arm and leg.

Although this patient is now under therapy, it is my feeling, particularly since the initial episode was brought on by an emotional shock, and presumably therefore, by a rise in blood pressure, that she should not undergo a protracted trial at this time.

Ideally, this should be postponed at least until six months after the initial infarction, and/or her blood pressure is under strict control. Sincerely yours, C. Pinckney Deal, M.D."

THE COURT: That was a little over a year [6] ago.

MR. NUSSBAUM: Yes, sir.

If your Honor please, I submit that the prognosis of Dr. Deal that he made in this letter that I read to you, that since that time she does suffer recurrent paralysis. I am just afraid, your Honor, that the tension of the trial may produce a serious danger to her.

Appendix P

THE COURT: I am not going to delay, Mr. Nussbaum. The case is old enough. If you wish to have her testimony taken by deposition and brought here, that you may do. I will give you oral permission to do that, If you want to do that. If you want to do that in her case, her testimony by deposition. She may die and you won't have her testimony at all.

MR. NUSSBAUM: Your Honor, may I consult with her before your Honor puts this down?

THE COURT: No. We have a specific date.

* * *

79-300

Supreme Court, U. S.
FILED
NOV 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-500

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

(Action No. 1)

INLAND CREDIT CORPORATION,

Respondent,

-against-

EDWINA RAGER,

Petitioner.

(Action No. 2)

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

-against-

INSPIRATION ENTERPRISES, INC., EDWINA RAGER and EDWARD RAGER,

Petitioners.

PETITIONERS' REPLY BRIEF

AARON NUSSBAUM
16 Court Street
Brooklyn, N.Y. 11241
Counsel for Petitioners

DICK BAILEY SERVICE, INC., P.O. Box X, S.I., N.Y. 10302
Telephone: (212) 447-5358

TABLE OF CONTENTS

Page

I 1

II 4

Conclusion 8

Table of Cases

Amer. Ry. Exp. Co. v. Levee, 263 U.S. 19 6

Guardian Assurance Co. v. Quintana, 227 U.S. 1200 6

Henry v. Mississippi, 379 U.S. 443 6

Hurtado v. California, 110 U.S. 516 (1884) 7

Kinsella v. United States, 361 U.S. 234, 246 6

Liner v. Jafco, Inc., 375 U.S. 301 6

Link v. Wabash Railroad Company, 370 U.S. 626, rehearing denied, 371 U.S. 873 2

Love v. Griffith, 266 U.S. 32, 33-34 6

Lovell v. City of Griffin, 303 U.S. 444, 450 6

Miller et al. v. Hainzl, et al., 5 App.Div. 2d 764 (1st Dept., 1958) 3

Societe International v. Rogers, 357 U.S. 196, 211 3

United States v. Grinnell Corp., 384 U.S. 563, 583 5

Ward v. Love County, 253 U.S. 17 (1910) 7

Windsor v. McVeigh, 73 U.S. 274, 278 2

Other Authorities

New York Civil Practice Law and Rules 3216 4

United States Constitution, Due Process Clause 5-6

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
No. 79-300

APPEAL NO. 1

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER and EDWARD RAGER,

-against-

INLAND CREDIT CORPORATION, ARDISCO FINANCIAL CORPORATION, STANLEY E. STERN, OSCAR DANE and HAROLD GREENSTEIN,

Respondents.

(Action No. 1)

INLAND CREDIT CORPORATION,

Respondent,

-against-

EDWINA RAGER,

Petitioner.

(Action No. 2)

APPEAL NO. 2

INLAND CREDIT CORPORATION,

Respondent,

-against-

INSPIRATION ENTERPRISES, INC.,
EDWINA RAGER and EDWARD RAGER,

Petitioner,

PETITIONERS' REPLY BRIEF

Petitioners' Reply Brief is respectfully submitted in view of several misleading references of law and fact contained in Respondents' Brief in Opposition to the Petition for Writ of Certiorari herein.

I

The cases cited in Respondents' Brief in opposition to the Petition for a Writ of Certiorari (*Link v. Wabash Railroad Company,* 370 U.S. 626, rehearing denied, 371 U.S. 873, and *Windsor v. McVeigh,* 73 US 274, 278) are not only completely distinguishable on the facts and the applicable law, but are in direct accord with Petitioners' contention that the grossly arbitrary dismissal or the cause of action, with prejudice and on the merits, violated Petitioners' right to due process of law.

In *Link v. Wabash Railroad Co., supra,* there was a marked pattern of inaction and dilatoriness extending over a period of six years after institution of the action, totally distinguishable

from the multiplicity of legal proceedings forced upon the Petitioners at bar to vindicate their right to a jury trial, to Discovery procedures, to the right of consolidation, to preliminary injunction, and to ancillary applications for stay of the trial in connection therewith both at the trial level and in the appellate courts of New York.

In addition thereto, Petitioners' incapacity to proceed to trial on June 15, 1978, a fact undisputed both by the trial court and the Respondents plainly established that the unavoidable delay in proceeding to trial "was due to inability fostered neither by . . . (petitioners') own conduct nor by circumstances within its control. (*Societe Internationale v. Rogers,* 357 U.S. 196, 211; *Link v. Wabash Railroad Co., supra,* at p. 636).

As posited in *Link,* 370 US at 633, the seminal issue applicable under the facts and circumstances at bar is: *"Whether such an order can stand on appeal depends not on power but on whether it was within the permissible range of the Court's discretion."*

In Windsor v. McVeigh, 93 US 274, at p. 277, cited in Respondents Brief, p. 12, the Court enunciated the principle fittingly applicable at bar:

> "Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Again, Respondents misleadingly represent to the Court that "petitioners' contentions find no basis in New York law," citing *Miller et al. v. Hainzl, et al.,* 5 App. Div. 2d 764 (1st Dept., 1958) (Resp. Br. pp. 18-19).

The *Miller* case is completely distinguishable, principally by the fact that the dismissal for neglect to prosecute in that case was *not* on the merits, as here, and was in basic accord with *New York's Civil Practice Law and Rule 3216*, namely, that a dismissal for want of prosecution is not on the merits, under the order specifies otherwise.

Moreover, in striking contrast to the multiplicity of pre-trial legal proceedings and appeals forced upon petitioners at bar to hurdle the barrier of Respondents' deliberate resistance to Petitioners' elemental rights of trial—the *Miller* case presented an opposite situation showing a plainly dilatory prosecution of an action begun in 1952 and finally dismissed in 1957 upon facts clearly demonstrating "that the plaintiff took the calculated risk of dismissal after every reasonable opportunity was given to him to proceed with the trial."

II

The Respondents disingenuously state to the Court as follows: "On January 21, 1977, petitioners requested and were granted an adjournment of trial, peremptorily, to May 9th 1977***" (p. 8).

We respectfully submit, in reply, that the adjournment was *sua sponte*, at the Court's own instance and request; it was not based on Petitioners' application. Secondly, the adjournment to May 9, 1977 was not "peremptorily," as the Court records would conclusively confirm. Finally, the adjournment from January 21, 1977 to May 9, 1977 was without any objection whatsoever on the part of the Respondents.

Respondents' misleading representation to the Court that "petitioners have failed to state a single instance in which the trial justice evidenced any prejudice or bias whatsoever, except to point to his adverse rulings" (p. 23) is conclusively con-

tradicted by the consistent pattern of extraordinary rulings of bias and prejudice fully set out in the Petition herein, at pp. 45-49.

Particularly revealing of the trial court's attitude "manifesting a closed mind" against Petitioners (*United States v. Grinnell Corp.* 384 U.S. 563, 583) is the fact that whereas, on June 15, 1978, the court specifically severed the Civil Court action (Action No. 2 of *Appeal No. 1*) and remanded it for a jury trial, including the Petitioners' counterclaims therein, and although definitively declaring as follows: "I am sending the case back to the Civil Court, the summary judgment. *I should really dismiss that* because you told me Mrs. Rager is ill. *I will give you a chance to present her.* The equity case is dismissed." (Appendix, p. 59a)—the trial judge nevertheless, on September 1, 1978, inexplicably reversed his position, as to *Appeal No. 2* herein, by declaring as follows:

> "Since the allegations in the Supreme Court action, which were the same as the counterclaims and defenses alleged in the answer in the summary proceeding were dismissed with prejudice, *they may no longer be relied upon in that proceeding either as a defense or as a counterclaim."* (!) (Appendix, p. 6a).

In net result, Petitioners' causes of action have been dismissed "with prejudice and on the merits," without a trial and without reasonable opportunity to be heard, even though the record of proceedings in the state court conclusively negate any suggestion or imputation whatsoever that the delay of trial was fostered by Petitioners' own conduct or by circumstances within their control.

On this record of grossly arbitrary and capricious action by the state court, we respectfully submit that Petitioners have been totally deprived of that "fundamental fairness shocking to the universal sense of justice" violative of the Due Process

Clause of the Constitution of the United States. (*Kinsella v. United States,* 361 U.S. 234, 246; *Guardian Assurance Co. v. Quintana,* 227 U.S. 100).

In *Henry v. Mississippi,* 379 US 443, the Court stated:

> "* * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. Cf. *Lovell, v. City of Griffin,* 303 U.S. 444, 450. As Mr. Justice Holmes said:
>
> > "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail . . . . Whether the right was denied or given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment." *Love v. Griffith,* 266 U.S. 32, 33-34."
>
> Only last Term, we reaffirmed this principle, holding that a state appellate court's refusal, on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself a question of federal law which this Court must ultimately decide. *Liner v. Jafco, Inc.,* 375 U.S. 301. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

In *Amer. Ry. Exp. Co. v. Levee,* 263 US 19, the Court held:

> "If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. *Creswill v. Grand Lodge Knights of Pythias,* 225 U.S. 246."

In *Hurtado v. California,* 110 U.S. 516 (1884), the Court noted that the due process clause of the Constitution extends to "all the powers of government, legislative as well as executive and judicial." There, the Court noted that:

> "* * *arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions."

In sum, the decision of the State Court below rested on no adequate state ground. The dismissal of petitioners' causes of action "with prejudice and on the merits," was totally "without any fair or substantial support" whatever, and was clearly contrary to the judicial precedents. (*Ward v. Love County,* 253 US 17 (1910). In *Ward,* the Court stated:

> "It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support. *Union Pacific R. R. Co. v. Public Service Commission,* 248 U.S. 67; *Leathe v. Thomas,* 207 U.S. 93, 99; *Vandalia R. R. Co. v. South Bend, ibid.* 359, 367; *Gaar, Scott & Co. v. Shannon,* 223 U.S. 468; *Creswill v. Knights of Pythias,* 225 U.S. 246, 261; *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164. And see *Jefferson Branch Bank v. Skelly,* 1 Black, 436, 443; *Huntington v. Attrill,* 146 U.S. 657, 683-684; *Boyd v. Thayer,* 143 U.S. 135, 180; *Carter v. Texas,* 177 U.S. 442, 447. Of course, if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. *Terre Haute & Indianapolis R. R. Co. v. Indiana,* 194 U.S. 579, 589. With this qualification, it is true that a

judgment of a state court, which is put on independent non-federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

AARON NUSSBAUM
16 Court Street
Brooklyn, New York 11241

Counsel for Petitioners.

October 31, 1979